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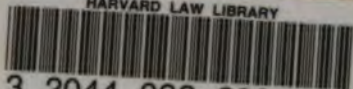
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THE LAW
OF
REAL PROPERTY
IN
ILLINOIS

Edward Jenline BY
E. J. WHITEHEAD
Of the Chicago Bar

IN THREE VOLUMES

VOLUME II

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ILLINOIS LAW OF REAL PROPERTY

VOLUME II

CHAPTER XIII

TITLE BY FORFEITURE—CONDITIONAL ESTATES

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§ 1180. Introduction—Title by forfeiture is the fourth method of acquiring title by purchase mentioned by Blackstone. Under the English law, lands, tenements and hereditaments might be forfeited in various degrees and by va-

rious means: (1) By crimes and misdemeanors; (2) By alienation contrary to law; (3) By non-presentation to a benefice, where the forfeiture is denominated a lapse; (4) by Simony; (5) By nonperformance of conditions; (6) By waste; (7) By breach of copyhold conditions; (8) By Bankruptcy. Very few of these English elements of forfeiture prevail in this country.

Forfeiture Defined. The definition given by Blackstone is: "Forfeiture is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements and hereditaments whereby he loses his interest therein, and they go to the injured party, as a recompense for the wrong which he alone, or the public together with himself, has sustained."¹

§ 1181. Principles Underlying the Doctrine of Forfeiture—Before proceeding to consider the various causes of forfeiture it would be well to consider some of the principles underlying the subject. Many of these principles are recognized and enforced in courts of law as well as in courts of equity, although equity may have a more extended jurisdiction.

§ 1182. Forfeitures Not Favored Either in Law or Equity—Forfeitures are not regarded by courts with any special degree of favor. Where a party insists upon a forfeiture, he must make clear proof, and show that he is entitled to it. It is a harsh remedy, and he who insists upon making a declaration of forfeiture, must be held strictly within the limits of the authority which gives the right.²

They are never enforced except when definitely contracted for, and nothing has been done by the party for whose benefit they are made to mislead the other party to his injury.³

¹—2 Black., 287.

³—United States L. I. Co. v. Rose,

²—Palmer v. Ford, 70 Ill. 369; 159 Ill. 476.

Knights of Pythias v. Kutscher, 72

Ill. Ap. 462.

A forfeiture should never be enforced where the language will bear a construction leading to a different result.⁴

A right of forfeiture, although tolerated, is not favored in courts of equity. Where a party seeks to enforce such right, and by his conduct has misled others, and suffered them to acquire rights in ignorance of his right to declare a forfeiture when he is called upon to disclose the true state of facts, a court of equity will not allow him to execute a forfeiture.⁵

§ 1183. **Compensation and Not Forfeiture** is the doctrine of equity, and courts of equity frequently relieve men who have acted fairly, though negligently, and dispensed with that which would make compliance with what the law requires, oppressive.⁶

§ 1184. **Relief Against Forfeitures Granted in Equity**—The preventing of forfeitures is within the protecting care of courts of equity, whenever wrong or injustice will result from their enforcement, and to prevent their enforcement affords a large share of equity jurisdiction. Inasmuch as equity does not favor forfeitures but refuses to enforce them, unless it is to promote justice, and prevent the perpetration of injustice and wrong, a clear case, appealing to the principles of justice, must be made out before a forfeiture will be enforced.⁷

A court of equity will grant relief against forfeitures occasioned by fraud, accident or mistake.⁸

The cases in which courts of chancery have relieved from penalties have generally arisen under contracts in which the performance of some collateral act, like the conveyance

4—*Voris v. Renshaw*, 49 Ill. 425; *Hartford F. I. Co. v. Walsh*, 54 Ill. 164; *Home F. I. Co. v. Pierce*, 75 Ill. 426.

5—*Fitzhugh v. Smith*, 62 Ill. 486; *Chadwick v. Parker*, 44 Ill. 326; *Carpenter v. Welty*, 101 Ill. Ap. 58.

6—*Andrews v. Sullivan*, 7 Ill. 327;

Murphy v. Lockwood, 21 Ill. 611; *Glover v. Fisher*, 11 Ill. 666; *Morgan v. Herrick*, 21 Ill. 481; *Clark v. Lyons*, 25 Ill. 105; *Fitzhugh v. Smith*, 62 Ill. 486.

7—*Voris v. Renshaw*, 49 Ill. 425.

8—*Houston v. Curran*, 101 Ill. Ap. 203.

of land, has been sought to be secured by an agreement that in the event of non-performance, a stipulated sum of money should be paid. In such cases relief will be granted against an unreasonable penalty, when full compensation can be otherwise given for the non-performance of the contract.⁹

It is well settled that where the agreement is simply one for the payment of money, a forfeiture of land incurred by its non-performance will be set aside in behalf of the defaulting party, or relieved against in any other manner made necessary by the circumstances of the case, on the payment of the debt, interest and costs, unless the complainant has debarred himself by his own conduct. This doctrine is applied where the failure has been caused by ignorance, and is not wilful.¹⁰

§ 1185. Relief Against Forfeitures Not Granted in Equity
—**When**—Where the agreement creates a mere pecuniary obligation and the default arises from gross negligence, or is wilful and persistent.¹¹

It is conceded that parties have a right to make their contracts as astringent as they please, and to make time the very essence of their contracts; and if one party without the consent of the other, allows the specific time to pass, no matter for what cause, without performing the condition, the stipulated consequences must follow.¹²

If parties under no disability choose to contract for a forfeiture, however hard it may seem, in the absence of any fraud or improper practices on the part of the vendor, the law can afford the vendee no relief.¹³

There may be an apparent conflict in the authorities on this subject, or it may be difficult to draw a distinction between them. But it may be concluded that in the exercise by a court of equity of a power of this character, every

9—Blair v. Chamblin, 39 Ill. 521.

10—Dodsworth v. Dodsworth, 254 Ill. 49.

11—Houston v. Curran, 101 Ill. Ap. 203.

12—Chrisman v. Miller, 21 Ill. 226.

13—Brink v. Steadman, 70 Ill. 241; Morgan Park v. Gahan, 136 Ill. 515.

case must necessarily depend upon its own equities, and a court of chancery may withhold its aid, and leave the parties to their legal rights, if the particular circumstances of the case before it are not such as call for its interposition on equitable grounds.¹⁴

§ 1186. Rescission of Contracts—Rights of Vendor and Purchaser—Forfeiture of Purchase Money—The question of forfeiture most frequently arises on the breach of covenants and agreements in deeds or contracts and the forfeiture in such cases frequently relate more to the forfeiture of the money paid, rather than to the forfeiture of the estate. It is usual in contracts for the sale of real estate providing for the payment of the consideration in future installments, to insert a provision in regard to such payments that time is the essence thereof, and a failure on the part of the vendee to make the payments as provided in the contract would authorize the vendor to declare the contract forfeited or terminated with the right to retain the money paid as liquidated damages.

And it has been held that when the contract by its terms imposes no forfeiture on default of any of the payments, the vendor before he can rescind must put the vendee in the same condition as he was before making the contract. So the vendor must tender the vendee any notes he may have executed for the purchase money, and also the several sums of money paid in the contract, before he can be permitted to rescind. This is understood to be the universal rule in such cases. The party against whom the rescission is sought, must be placed *in statu quo*.¹⁵

But it has also been held that where there is no provision in the contract authorizing the vendor to retain such payments, yet he may do so on the breach of the contract by the vendee. It is said by the court, after a careful re-

14—Blair v. Chamblin, 39 Ill. 521.

15—Murphy v. Lockwood, 21 Ill.

view of the authorities: "From the authorities above cited, and others of like weight and respectability, we have deduced these rules: Where the vendee enters upon the performance of the contract, and, paying part of the purchase money, makes default which is inexcusable and the vendor, without fault, exercises the right given by the contract of declaring the same terminated, and in so doing acts fairly and within the scope of the power, then no action can be maintained by the vendee to recover back what he has paid. But a vendor, who is himself in fault, for fraud or violation of his contract, can not exercise the power so given without making restitution of what he has received under it. In such case the law would imply a promise to repay the purchase money received, and an equitable action for money had and received would lie to recover it."

"We do not, however, hold, or mean to be understood as holding, that these rules cover the entire subject matter. There may be cases where the vendee, charged with a technical default under such a contract, might, under particular circumstances, be entitled to other relief, as in case where he had paid a large portion of the purchase money, made valuable improvements upon the property, and his default was the result of fraud, accident or mistake; or the vendor should attempt to exercise the power for forfeiture in cases not fully within its scope; or unfairly and oppressively, with the view of taking an undue advantage of the vendee by a forfeiture of payments and improvements, and in all other cases falling within the principles by which courts of equity are governed, the vendee may resort to such a court to restrain the act of the vendor, if about to be done, or if accomplished, to set it aside, and to have the equities of the parties arising from their relation adjusted according to the circumstances of the case.¹⁶

Where a vendor of land exercises the right, reserved to

¹⁶—*Wheeler v. Mather*, 56 Ill. 241.

him in the contract of sale, of declaring a forfeiture of the same for the non-payment of the money due by the terms thereof, on a bill in equity by the assignee of the vendee, for a specific performance of the contract, and in the event that specific performance was not granted then for a decree requiring the vendor to return the purchase money paid, it was held that no relief could be granted on either ground, on account of the gross laches of the assignee.¹⁷

The only cases in which the purchaser of real estate is entitled to recover back the money he has paid on the contract of purchase are:—1—where the contract has been rescinded by mutual consent and agreement of the parties; 2—where the vendor is incapable or unwilling to perform the contract on his part; and 3—where the vendor has been guilty of fraud in making the contract. But where the contract has been declared forfeited, pursuant to its own terms, on account of the default of the purchaser, he is not entitled to recover back what he has paid.¹⁸

And a forfeiture of a part under the contract, does not affect the residue, where the contract is divisible.¹⁹

§ 1187. Covenants in Contract Not Released by Clause of Forfeiture—Although there may be a clause in the contract providing that in case the vendee shall make default in his payments, the vendor may forfeit the same, such clause does not release the vendee from his covenants, in case he makes such default. In all such cases, the mere lapse of time, with non-performance, does not of itself obliterate the contract,—so that neither party has any rights, and is subject to no liability under it as if it never had been. After the expiration of the time, and the non-performance, the vendor has the right to still treat the contract as subsisting and sue the vendee on his covenants. The clause

17—Whitaker v. Robinson, 65 Ill. 411. 362; Harlow v. Snow, 147 Ill. Ap. 369.

18—Bryson v. Crawford, 68 Ill. 19—Chicago v. Sexton, 115 Ill. 230.

of forfeiture is put in for the benefit and security of the vendor, and does not release the vendee from his covenants to pay, till the vendor chooses to avail himself of that clause. Till then the rights and liabilities remain the same as if no such clause is in the contract. And so long as the vendor reserves the right to sue the vendee upon his covenants to pay, so long does the right subsist in the vendee to tender the balance due, and demand a deed.²⁰

§ 1188. Courts Not Inclined to Search for Causes of Forfeiture—In enforcing forfeitures, the courts should never search for that construction of language which will produce a forfeiture, when it will bear another reasonable construction which will not produce such a result. Forfeitures are odious to the law, and when contracts are burdened with conditions rendering it exceedingly difficult to observe them, the courts will feel no inclination to strain for constructions of conditions that will defeat a recovery, but will content themselves by giving the language a fair and reasonable interpretation.²¹

The cause of forfeitures must be brought clearly within the forfeiture clause of the contract or it will be of no avail.²²

§ 1189. Courts of Equity Will Not Enforce a Forfeiture—Courts of equity will never, by its affirmative action or by affirmative provisions in its decree, enforce a penalty or forfeiture, but will always leave the party entitled thereto to prosecute his claim in a court of law, according to legal rules. Compensation and not forfeiture is the doctrine of equity. While courts of equity, not less than courts of law, recognize the rights of parties to a contract to stipulate for penalties and forfeitures, and while, on a proper showing, courts of equity will relieve against forfeitures, it is a rule of universal application that it will never enforce either a penalty or forfeiture.²³

20—Chrisman v. Miller, 21 Ill. 226.

22—Aurora F. I. Co. v. Eddy, 55 Ill.

21—Hartford F. I. Co. v. Walsh, 54

213.

Ill. 164.

23—Bucklen v. Hasterlik, 155 Ill.

Not even upon the special ground of removing a cloud upon the title.²⁴

Courts of equity will not compel a discovery that will expose a party to a penalty or a forfeiture.²⁵

§ 1190. Exception to the Rule—That Equity Will Not Enforce a Penalty or Forfeiture—Where the owner of land charged with the payment of an annuity conveys a portion of it in consideration, in part, that the grantee pay a portion of the annuity, and upon condition of a failure to pay shall work a forfeiture, if the grantor to save his portion of the land, is compelled to pay the annuity he, and not the annuitant, can maintain a bill to enforce the forfeiture.²⁷

§ 1191. Power to Declare a Forfeiture Strictly Construed—Clauses in contracts for service in the nature of forfeitures must be strictly construed. Where the right to recover a deposit depends upon the exercise of the judgment of a certain person, the forfeiture thereof under such a clause will not be permitted unless it be shown that there was an exercise of such judgment in good faith, and in a reasonable, and not in an arbitrary and capricious manner.²⁸

The power to declare a forfeiture is not an arbitrary one, to be exercised capriciously, but must be exercised only in good faith and for reasonable cause.²⁹

§ 1192. Declaration of Forfeiture—After default by the vendee, the vendor has the right at any moment to declare the forfeiture and to deprive the vendee of the right to

423; *Traders I. Co. v. Race*, 142 Ill. 338.

24—*Douglas v. Union M. L. I. Co.*, 127 Ill. 101; *Poe v. Ulrey*, 133 Ill. Ap. 298; *Toledo, St. L. & N. O. R. R. Co. v. St. L. & O. R. R. Co.*, 208 Ill. 623.

25—*Crandall v. Sorg*, 99 Ill. Ap.

22.

27—*Nelmeyer v. Knight*, 98 Ill. 222. (See also case of *Harper v. Tidholm*, 155 Ill. 370.)

28—*Chicago C. Ry. Co. v. Blanchard*, 35 Ill. Ap. 481.

29—*Chicago v. Sexton*, 115 Ill. 230.

claim a performance of them, and the vendor of the right to sue the vendee on his covenants.

The mere act of offering the land for sale, or entering on their sales book or any other act showing that the vendor considered the contract as terminated, is sufficient to put an end to it, and deprive the vendee of the right to claim its performance. And a sale of the premises to a stranger is sufficient of itself to show an election by the vendor to seek his remedy by taking advantage of the forfeiture clause, and to release his remedy on the covenants.³⁰

§ 1193. Power to Declare a Forfeiture Cannot Be Delegated—The power to declare a forfeiture contained in a contract cannot be delegated, at least unless it is so provided in the contract. The party upon whom the power is conferred cannot leave the matter to the judgment of another. The power must be exercised by the person on whose judgment the parties placed it.³¹

§ 1194. Wrongful Attempt to Forfeit—An attempt by the vendor to declare a forfeiture of the contract of sale, under a power therein given, in case of default on the part of the vendee, where the vendor has, by his act waived his right to do so, would be wrongful, and put the vendor in fault, so that the vendee would be at liberty to treat the contract as rescinded, stop short of its performance, and he could sue the vendor in an action at law, and recover all he had paid on the contract, although, by the terms of the contract, if the forfeiture had been rightfully declared, all that had been paid by the vendee would have become forfeited to the vendor.³²

The withdrawal of an unaccepted offer to sell, or the retraction of an option which the other party has not seen fit to accept, involves none of the elements of a forfeiture. It deprives no party of any right and abrogates no contract,

30—*Chrisman v. Miller*, 21 Ill. 226.

32—*Igelhart v. Gibson*, 56 Ill. 81.

31—*Chicago C. Ry. Co. v. Blanchard*, 35 Ill. Ap. 481.

but is merely the exercise by a party of the right to recede from a proposition which the other party has not seen fit to adopt.³³

§ 1195. Notice to the Grantee or Devisee of the Conditions of Forfeiture Essential—When, in the absence of a will, each of the devisees would be entitled to his or her respective proportions of the estate, according to our statute of descent, a condition subsequent contained in the will, the breach of which would divest the estate which became vested by the will in the devisee, it must be shown that the conditions of the will in this regard were brought home to the knowledge of the devisee, before the breach, in order to complete the forfeiture. Nor is this principle confined in its scope and operations to wills or devises to heirs at law. The rule may, in more general terms, be stated thus: One who has an estate or title real independently of the deed or instrument containing a condition of forfeiture, shall not be presumed to have notice of the condition, and he shall not be held to have incurred a forfeiture, unless he committed the breach with knowledge of the condition and consequences. It is true that this question has rarely arisen for adjudication, nevertheless, it is as well settled as any other principle of the common law, and is founded in substantial reasons of justice. So where by will the testator devised his estate to his heirs at law, with the condition that none of his children then under the age of twenty-one years should marry till they each attained the age of twenty-one years, it was held that a daughter, in whom the estate had become vested and who had no notice of the condition, and who married four months before attaining the age of twenty-one years, did not thereby forfeit her estate.³⁴

An agreement in regard to the sale and purchase of land, that time shall be the essence of the contract may be waived, either by the consent or conduct of the parties, or by the

33—*McCauley v. Coe*, 150 Ill. 311.

34—*Shackleford v. Hall*, 19 Ill. 211.

conduct of the party for whose benefit such agreement is made. Where time is stated in the contract to be the essence of the contract if both parties, by a mutual course of conduct treat the time clause as waived or suspended, one of them cannot suddenly insist upon a forfeiture, but must, in order to avail himself of the time clause, give reasonable, definite and specific notice of his change of intention.³⁵

§ 1196. Waiver of Forfeitures—It is a rule of law that a forfeiture may be waived by the party for whose benefit it is inserted in the contract or other instrument.

The reason for the rule holding that a waiver of a forfeiture may be made by the party for whose benefit it is inserted in the contract, either by his declarations or his course of conduct, is, that the party against whom the forfeiture is declared or attempted to be enforced, by such declarations and conduct, is led to believe that by the indulgence of the party entitled to declare a forfeiture, his contract will not be forfeited, even though prompt payment, according to the strict terms of the contract, is not made.³⁶

In a contract for the conveyance of land, where the vendor has shown great indulgence to the vendee, such as allowing installments of payments to remain a long time over due and then receiving partial payments, time not being the essence of the contract, the vendor may be prevented from suddenly insisting upon a forfeiture.³⁷

Where a series of promissory notes is given for the purchase price of land, and the contract of sale reserves the right to the vendor to declare a forfeiture thereof in case of default in the payment of any one of the notes within a specified time after maturity, a transfer by the vendor of the last note in the series to a bona fide holder, after

35—*Watson v. White*, 152 Ill. 364.

37—*Murphy v. Lockwood*, 21 Ill.

36—*United States L. Co. v. Ross*, 610.

159 Ill. 476.

default in respect to one of the prior notes, and knowledge thereof, would operate as a waiver of the right to declare a forfeiture after such default. By the transfer of the note last in the series the vendor is debarred of the right to rescind the contract of sale on account of default in the payment of any of the notes still remaining in his hands, either under the power given in the contract or otherwise, because, by such transfer, he had put it out of his power to terminate the contract as to the whole extent to which it remained executory on the part of the vendee.³⁸

Where a party leases a lot of ground for the purpose of erecting buildings thereon, to be leased to other tenants, and the lessor reserves the right to declare a forfeiture of the lease for the default in payment of the ground rent, as it shall become due, and several installments of rent became due, but the lessor, at the instance of the lessee, waives his privilege to declare a forfeiture and does not press the lessee for payment, other than to receive the rents of the tenants of the building, which had been provided for by an after agreement with the lessee, and where negotiations have been going on for an adjustment of the matter of the ground rent, and the lessor had evinced a disposition to favor the lessee in that regard, it was held that under the circumstances, notwithstanding the lessee had by the terms of the lease, expressly waived the right to any notice of an intention on the part of the lessor to declare a forfeiture, yet he should have notice before such a declaration could properly be made. And such notice should be certain and clear.³⁹

The owner has the right to waive the forfeiture and by his act estop himself from insisting thereon. So where a great public work is undertaken requiring certain land for its completion, and the deed therefor contained a condition subsequent, requiring the work to be completed within a given time, and on a failure in that respect the title to the

38—Iglehart v. Gibson, 56 Ill. 81.

39—Palmer v. Ford, 70 Ill. 369.

land was to revert to the grantor, on a failure on the part of the public authorities to complete the work within the given time, if the grantor actively encourages the grantee to proceed with the work and expend a large amount of money in so doing and insists that the work be carried on with greater expedition, stating that he has no desire to deprive the grantee of his rights though having the power to forfeit the title, the grantor will afterwards be estopped from declaring a forfeiture. It is an elementary principle of law that it is not necessary, in any case, to prove the performance of a condition which has been waived by the party having the right to demand performance. A condition one waived is gone forever, and its performance cannot thereafter be required.⁴⁰

§ 1197. Forfeiture on Dissolution of a Corporation—Upon the dissolution or civil death of a corporation, all its real estate, by the strict rules of the common law, reverts to the original owners or their heirs, and all its personal estate vests in the crown, in England, and in the State here, and all debts due to and from it are by operation of law extinguished.

Equity, however, views the matter in quite a different light. In equity the corporation is regarded as a trustee holding the corporate property for the benefit of its creditors and shareholders, which, upon its dissolution or civil death, a court of chancery will lay hold of as a trust fund, and distribute it for their benefit. With a view of mitigating the rigor of the common law with respect to the effects of a defunct corporation, the legislature in this and most, if not all, of the other States of the Union have, by appropriate legislative enactments, provided for a just and equitable distribution of their assets in cases of insolvency, or sudden dissolution for any cause, and our own act on the subject contains a provision which in express terms ex-

⁴⁰—*Sanitary District of Chicago v. Chicago T. & T. Co.*, 278 Ill. 529.

tends their corporate existence two years from the date of their dissolution for such purposes.⁴¹

The rule of the common law that on the dissolution or civil death of a corporation its real estate reverts to the original grantor or his heirs, has however been modified in modern times, in respect to corporations organized for pecuniary benefit. In respect to such corporations, the shareholders are the original donors of the corporate property, each member contributing his share of the capital for the common benefit of all; and the corporation so long as it remains solvent, will hold the property given it, merely as trustee for its stockholders. When such a corporate body is dissolved or becomes insolvent, equity will see that its property is distributed, first to the payment of its debts, and next among its stockholders.

But in the absence of statutory regulations to the contrary, the doctrine of reverter to the original owner or his heirs, in case of corporate dissolution, is applicable at this day to public or eleemosynary corporations, even in the view of a court of equity. That is to corporations which have no stockholders.⁴²

§ 1198. Tender of Performance of Contract—The rule is that a tender is never required, nor its omission ever prejudicial, where, from the circumstances, it is clear that such a tender, if made, would have been refused. The law does not require the performance of a mere idle act, nor one which would be useless. Where the vendee objects to a title a tender of a deed, which he declares he will not accept, is unnecessary.⁴³

To entitle a purchaser to demand a deed and maintain a bill for specific performance, it is sufficient that he is ready and offers to pay any sum that may be found due, and to comply with the contract on his part, and the tech-

41—Life Association of A. v. Fassett, 102 Ill. 315.

42—Mott v. Danville Seminary, 129 Ill. 408.

43—Bucklen v. Hasterlik, 155 Ill. 423; Lyman v. Gedney, 114 Ill. 388; Watson v. White, 152 Ill. 364.

nical rules that govern pleas of tender in actions at law are not applicable in courts of equity.

The allegations in a bill for specific performance by a purchaser of real estate which are deemed sufficient to be made by such purchaser as to his readiness to comply with the terms of the contract are well stated in the case of *Watson v. White*, 152 Ill., 364, which should be examined.⁴⁴

§ 1199. Forfeitures Under Foreign Laws and Regulations Not Enforcible in This State—It is a well settled rule, that the courts of one country will not enforce either the criminal or penal laws of another, nor will they carry out or be guided by the laws of another, regarding the forms of action, nor the remedies provided for civil injuries so it was held that the forfeiture provided for in the usury laws of Massachusetts, being a part of the law of remedy, could not be enforced in the courts of this State.⁴⁵

§ 1200. Forfeitures for Crimes and Misdemeanors—Under the English laws lands, tenements and hereditaments were forfeited to the Crown for treason, felony, misprision of treason, proemunire, drawing a weapon on a judge, or striking a person in the presence of the King's principal courts of justice, and popish recusancy.⁴⁶

§ 1201. Public Policy of Illinois Against Forfeitures of Estates for Conviction of Crimes—The constitution of the United States provides that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted," and by an act of Congress passed in 1790, all corruption of blood and forfeitures, whether for treason or felony, as to convictions under the Federal law, were abolished. This doctrine of forfeiture of estates for criminal offences never had any existence in Illinois, even in the modified form which seems to be recognized in the Federal constitution. In all the constitutions adopted in this State a provision similar to the one found in

44—*Watson v. White*, 152 Ill. 364.

46—2 Black., 267.

45—*Sherman v. Gassett*, 9 Ill. 521.

section II of article 2, of the constitution of 1870 is to be found. That section declares: "All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate; nor shall, any person be transported out of the State for any offense committed within the same."

There are in these several constitutional provisions clear and unequivocal declarations of the public policy of this State to the effect that no forfeiture of property rights shall follow conviction for crime. This public policy is further manifested by our statutes in regard to descent of property in case of intestacy, and the general power of disposition of property by will, conferred by our statute of wills. In none of these statutes is the right conferred in respect to property made to depend on the manner or cause of the death of the owner. To hold that the property of one who was executed in this State for a crime was not subject to the same law of descent and devise of property generally, would be nothing less than judicial legislation by engrafting exceptions in the statutes where none exist by the language of the law. Statutes of descent and devise are legislative declarations of the public policy of the State on the subject to which they relate. The rules of common law on these subjects have been wholly superseded by our statutes. So it was held that an executor of a person hung for murder might recover on a policy of life insurance issued by an insurance company to the criminal.⁴⁷

§ 1202. Alienation Contrary to Law is one of the grounds for the forfeiture of an estate at common law. So, if the alienation were (1) in mortmain, or to (2) an alien, or to (3) a particular tenant, as where the alienation was of a greater interest than the grantor was authorized to grant, then the estate was liable to forfeiture. The cause of forfeiture arose in the two former cases from the incapacity

⁴⁷—*Collins v. Metropolitan L. I. Co.*, 232 Ill. 37.

of the alienee to take, and in the latter case from the inability of the alienor to grant (1) *Alienation in mortmain* is an alienation of lands or tenements to any corporation, sole, or aggregate, ecclesiastical or temporal. The expression, "Mortmain" means in dead hands, and as one of the common law elements of a corporation was perpetual existence, if a corporation acquired title to real estate it might hold it forever, and thus it was said to be in dead hands; the real estate was taken out of the ordinary course of commercial transactions; this was considered detrimental to the interest of the kingdom; there were other reasons springing out of the feudal tenure which operated to render such titles objectionable, which are not necessary to be mentioned here.

Although the English law may be the basis of the public policy of Illinois, yet its severity is greatly modified by legislation and judicial decisions, doubtless because forfeitures are abhorred both at law and in equity.

§ 1203. Statutory Limitations Regarding Corporations—

It is provided by the statute "That corporations may be formed in the manner provided in this Act for any lawful purpose except banking, insurance, real estate, brokerage, the operation of railroads and the business of loaning money; provided, that horse and dummy railroads, and organizations for the purchase and sale of real estate for burial purposes only, may be organized and conducted under the provisions of this Act: And provided further, that corporations formed for the purpose of constructing railroad bridges shall not be held to be railroad corporations." ⁴⁸

It is also provided that the persons who propose to form a corporation shall make a statement to that effect, under their hands, and duly acknowledged before some officer in the manner provided for the acknowledgment of deeds, setting forth among other things, the object for which it

⁴⁸—Sec. 1, Ch. 32, R. S.

is formed and the duration of the corporation, not exceeding, however, ninety-nine years, which statement shall be filed in the office of the Secretary of State.⁴⁹

Thus taking away the idea of a perpetuity, and showing that the object of the corporation is for a lawful purpose.

§ 1204. Restrictions on Corporations in Illinois as to Real Estate—The statutes of Illinois provide that corporations may own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the use of the corporation. Provided, however, that all real estate so acquired in satisfaction of any liability or indebtedness, unless the same may be necessary and suitable for the business of such corporation, shall be offered at public auction at least once a year, at the door of the court-house of the county wherein the same is situated, or on the premises to be sold, after giving notice thereof for at least four consecutive weeks in some newspaper of general circulation published in said county; and if there be no such newspaper published therein, then in the nearest adjacent county where such newspaper is published; and said real estate shall be sold whenever the price offered for it is not less than the claim of such corporation, including all interest, cost and other expenses. And provided, further, that in case such corporation shall not within the period of five years, sell such land either at public or private sale, as aforesaid, it shall be the duty of the State's Attorney to proceed by information in the name of the People of the State of Illinois, against such corporation, in the circuit court of the county wherein such lands, so neglected to be sold, shall be situated; and such court shall have jurisdiction to hear and determine the facts, and to order the sale of such land or real estate at such time and place, subject to such rules as the court may establish, and after deducting the fees and costs of proceeding from the proceeds

49—Sec. 2, Ch. 32, R. S.

of such sale, the residue shall be paid over to such corporation.⁵⁰

And it is further provided that no foreign or domestic corporation established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this State, except as provided in this act.⁵¹

The foregoing provisions of the statute doubtless apply to commercial corporations, or as they are termed corporations for pecuniary profit as well as to such voluntary corporations as are organized "not for pecuniary profit."

It is provided, however, that "Any corporation that may be formed for religious purposes under this act, or any law of this State, for the incorporation of religious societies, may receive, by gift, devise or purchase, land not exceeding in quantity twenty (20) acres, and may erect or build thereon such houses, buildings or other improvements as may be deemed necessary for the convenience and comfort of such congregation, church or society, and may lay out and maintain thereon a burying ground; Provided, that only ten acres of such land shall be exempt from assessment for taxation, and that all such land in excess of ten acres shall be assessed at the same valuation as if it were not a part of a cemetery; but no such property shall be used except in the manner expressed in the gift, grant or devise, or if no use or trust is so expressed, except for the benefit of the corporation, church or society for which it was intended." ⁵²

§ 1205. The Public Policy of Illinois in Regard to Corporations Acquiring and Holding Real Estate has been considered by the Supreme Court in a number of cases. One of the first is that of *Carroll v. The City of East St. Louis*, 67 Ill. 568, which was a case, however, involving the right

50—Sec. 5, Ch. 32, R. S.

52—Sec. 42, Ch. 32, R. S.

51—Sec. 26, Ch. 32, R. S.

of a foreign corporation to acquire and hold real estate in this State.

As the case is an early one in which the public policy of the State was fully considered, and a general review of the subject was given, it may be regarded as a leading case on the subject, and extended excerpts from the opinion may be justified.

It was an action of ejectment brought by the city against Carroll, to recover the possession of certain lots. It appeared that the title of the property was at one time in one Barlow, who conveyed it to the "Connecticut Land Company," a corporation organized under the laws of Connecticut, and authorized to receive, grant, convey, dispose of, and transfer real estate, and to sell and exchange the same.

The question put to the court was: Can a corporation created in another State for the sole purpose of buying and selling land, come here and prosecute the business for which it was created, by purchasing and holding lands in this State?

In answer to this question the court says: "It must be remembered that the law making power of the State, where the authority is proposed to be exercised, is alone invested with the authority, and must determine its public policy. With this power the courts have not been intrusted. It is for them to ascertain and apply the law and the legislative policy, and not to inaugurate it." The public policy of the State may be ascertained by reference to the general course of legislation, either by prohibitory or enabling acts, or by its general course of legislation on a given subject."

"Our general assembly have, in a variety of modes, and on a very large number of occasions, manifested, in unmistakable terms, a determination that perpetuities in real estate shall not exist in this State. To prevent it, and to keep the tenures of the lands in the State free, at an early period in the legislation of the State, the common law allowing entails was abolished, and such conveyances rendered inoperative to create such an estate. And (it is said), in-

asmuch as such tenures create a perpetuity in particular families, it tends to give them special privileges not enjoyed by all. It is the foundation upon which aristocracies are built and sustained. It takes real estate out of market and prevents its acquisition by the citizens generally and prevents its distribution even in families by devise and descent. These, and it may be other considerations, have induced, it is believed, every State in the Union to abolish estate tail, because they, by creating perpetuities, are not in harmony with the principles upon which our government is based, and are prejudicial to the general welfare and prosperity of our people.

“The policy of the legislation in this country, ever since the establishment of our form of government, has been with a view to leave all free to acquire property, and to protect and foster no class by conferring special privileges, or placing, or even permitting wealth to be placed, in the hands of a portion, to be held in perpetuity. In fact, its pernicious effect was so clearly seen and felt in Great Britain, that perpetuities have been discountenanced in that jurisdiction. The theory of our government is, that not only the laws must protect all alike, but that every citizen must be left equally free in the pursuit and acquisition of property. When feudalism prevailed throughout Europe, the care of the government was for the lords and the privileged classes, and entails and perpetuities of tenure in their families, or particular portions of them, was adopted as the best means to secure their continued wealth and influence. But as trade and commerce advanced, and the principles of free government became better understood, it was found that the public welfare was retarded by restrictions upon the tenures to their landed property, and centuries of fetters that had trammelled it, have been gradually and constantly relaxed and removed, until many of the inconveniences attending the system have disappeared.

“Of the same nature as the feudal system were monasteries and religious houses, that acquired large bodies of

lands and held them in perpetuity. The prejudicial effects of this policy were, at an early day, felt, as it took real estate out of the commerce of the country, and was found to be a serious impediment to national prosperity if not to advancing civilization. This was, perhaps, the strongest motive that led to the enactment of the laws of mortmain in Great Britain. There were, no doubt, other considerations, such as, that it curtailed the power and influence of the feudal lords, and their loss of revenues by being deprived of their escheats, wardships, reliefs and the like. Hence, these laws of mortmain were adopted, allowing the lord immediate to declare a forfeiture of the estate sold to a corporation, and on his failing to do so, the lord mediate might and on his failing to do so, then the king.

“Thus it will be observed that these statutes do not prevent corporations from taking title by conveyance, but only enable the forfeiture of the title, which thus passes to the lord or the king. If, then, these bodies are not prohibited taking by the laws of mortmain, they, if in force in this State, would not prevent this corporation from holding lands until the State should proceed and obtain a forfeiture. Whether they are in force when applied to a proper case, we shall not now determine, as we think they have no application to this case.

“Our general assembly have, from the very organization of our government, manifested a clear and decided opposition to permitting corporate bodies to hold lands to any great extent in perpetuity. In granting charters of insurance, agricultural, manufacturing and benevolent organizations, of which we have a large number, as a general rule, with, it may be, a few exceptions, when authorized to buy or sell lands, they have been restrained to a small quantity. So jealous has been the legislature of the power to purchase and sell lands by these corporations, that it adopted, as a policy, that the authority thus given should not be perverted or abused; that they, as an undoubted policy, limited the power to only enough of real estate to enable them to

carry out and accomplish the purposes of their organization, other than buying and selling real estate."

In fact, the whole course of our legislature, in hundreds of charters granted, shows a fixed and stern determination not to yield such power to these bodies.

We do not infer this policy, as seems to be supposed, because the legislature did not, in term, confer the power on these various bodies, but it is from the almost uniform prohibition of its exercise, and in this is the distinction.

We have been referred to some half a dozen private acts passed by our general assembly, creating corporations for various purposes, in which the power is, incidentally in some, and as primary objects in others, given to buy and sell lands. They are special and private laws, and in our mind do not tend, in the slightest degree, to determine the general policy of the State on the subject. Like all other exceptions, they tend to establish, rather than impair, the force of the general rule. It is the general laws of a State to which all persons refer to ascertain its general policy, but in this case our special legislation is overwhelmingly in support of the general laws on this subject. We are totally at a loss to conceive how we can infer that, because a few special charters are opposed to the fixed and almost uniform policy of the State, for half of a century manifested on almost every occasion when a charter was asked, that the entire policy of the government has thus been changed. We regard it as forming none, not even the slightest, ground for such an inference. But since the charters referred to were adopted, as also that under consideration, the same policy has been clearly manifested.

"At the session of 1871-2, the general assembly, in revising the general incorporation laws, have adhered strictly to the policy so clearly manifested by former legislation. The first section of the law provides for the formation of such bodies for any lawful purpose, except banking, insurance, real estate, brokerage, the operation of railroads and the business of loaning money. It is contended that

this section, by implication, authorizes the formation of corporations to buy and sell real estate, as it does not, in terms, prohibit it, and if so, the Connecticut Land Company may do so, as we should infer a change of policy. If this were the only provision in the enactment, it would be a violent presumption, in view of the past legislation, to arrive at such a conclusion. But the fifth section relieves it from this doubt, if there is any, as it limits all but churches organized under the act, to so much real estate as may be necessary for their organization. Churches are, as before, limited to ten acres; but corporations are authorized to purchase lands in satisfaction of debts due them, but are required to offer the same for sale at public auction, as often, at least, as once in each year, and if not thus sold for cost and interest, within five years, the State's Attorney is required to institute proceedings in the circuit court for the sale of such property.

“We should not expect that foreign corporations, who can perform no binding act in this State without our consent, would demand more rights and privileges than are conferred on our own, created by general law. If the general assembly, for any reason, confers special power on a few corporations that have been persistently and almost uniformly denied to all other corporations of our State, it gives foreign bodies, who only act by mere sufferance, no right to demand the same privileges. They should surely not complain if permitted to exercise their powers here to the extent, and only to the same extent, that similar bodies of our own are allowed under the general law.

“We have been referred to numerous and able opinions of courts of other States, for whom we have the highest respect, which announce a different rule from that we have adopted. In these opinions, we have no doubt they have fully and fairly carried out the legislative policy of their States. But we have little doubt that their public policy differs from ours. What may be supposed to be highly calculated to advance the public interest of one State, may be regarded as pernicious in another; hence, the great diversity in the statutes of the various States, which are but

a manifestation of the public policy of each State. And, in the light of the past and present legislation of this State, we do not entertain the slightest doubt that we have, in this case, adhered strictly to the policy of our State, and if so, we are powerless to change the policy, if we would."

"We do not desire that what we have said should apply to incorporations, whether domestic or foreign, which have purchased lands for the mere purpose of erecting offices or buildings necessary for the purpose of carrying out the legitimate business for which they were organized, and in the purchasing land in collecting debts. In such cases, where their charters authorize it, we presume they might purchase and hold real estate to that, but no greater extent." 53

And it was held that the Connecticut Land Company acquired no title by its deed from Barlow, and it could convey none to the City, so as the City failed to prove title the judgment of the trial court was reversed.

There is a dissenting opinion by Justices Scott and Sheldon to the effect that in so far as the opinion would hold invalid a transfer of land by the corporation to a purchaser they do not concur therein.

Another leading case on this subject is that of *The People v. The Pullman Palace Car Co.*, 175 Ill. 125. The company was organized under a special charter, granted in 1867, which provided that "the corporation shall have power to manufacture, construct and purchase railway cars, with all convenient appendages, and supplies for persons traveling thereon, and the same may sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper," and it may be lawful for the company hereby incorporated to purchase and acquire and hold such real estate as may be deemed necessary for the successful prosecution of their business, and may have power to sell and convey the same."

53—*Carroll v. East St. Louis*, 67 Ill. 568.

An information in the nature of a quo warranto, was filed by the Attorney General, for a forfeiture of the charter of the company for usurpation of powers not conferred by the charter. The allegations contained in the information of the usurpation of powers were twenty-five in number. The defendant replied by several pleas.

The Attorney General demurred to the pleas, which being overruled by the court, he elected to abide by his demurrer, whereupon the court dismissed the information, and the Attorney General appealed.

Among the allegations in the information was one that the defendant owned and controlled a large ten-story building worth \$2,000,000, in the business center of Chicago, that it rented a large portion of the building to other persons, firms and corporations, and derives a large income therefrom; that a small portion of it only is occupied by the company; that the block was built as an investment, and not because it had any real necessity therefor. The defendant pleaded that it had ever since its organization, had its general offices near the business center of the City of Chicago, and that it was necessary and proper to do so; that it became impossible to rent proper general offices and that the rental charged for poor offices were high and exorbitant; that it had therefore erected a building in which were kept its general offices and some store rooms; that the land on which the building was erected was valuable, and could not, without great loss, be utilized for the erection other than a high building, and such as was in keeping with and equal to the surrounding buildings; that the defendant erected on the land a nine-story building, of which it then used nearly one-half, and that if its business continues to increase as it has in the past, it will soon also use all of it for its general offices; that in the meantime it rents to different parties such offices as it is not at present using; that the erection of such a building is in keeping with the usual practices of other large corporations, doing kindred business, and it could not rent such general offices as it required in

the business center of Chicago, for a rental as low as five per centum per annum on the amount which said building, and land on which it stands, cost the defendant.

The court says: "We think the plea presented a good defense to the charge preferred in the information with reference to the building. The right of the appellee to construct an office building is indisputable, as so, also, is the right to select the most eligible and desirable site. It would be but a narrow and wholly unjustifiable view of this power to insist that in planning and constructing a building the corporation should leave out of consideration its probable prospective requirements, and should erect a building containing only as many rooms and offices as its present business might demand. The corporation had the right, as we think, to look to and prepare for the future. It was but true economy to do so, and if it proceeded in good faith, as we are to assume from the conceded statement in the plea that it did, no reason is perceived why it should be deemed bound to permit such parts of the building as are not at present required for the accommodation of its business, to remain vacant, but, on the contrary, it might lawfully obtain such income from the rents of such rooms as might be possible until the growth or increase of its business demanded additional rooms or offices.

A corporation could not be permitted, under mere color and pretense of furnishing accommodations for the transaction of its own affairs, to construct a building or rooms for the purpose of renting the same, and engage in renting such houses and rooms as a business, if such pursuit was, as it here clearly is, beyond and distinct from that it was created to pursue and accomplish. But the averments of the plea do not justify the imputation that the acts of the corporation are not colorable, and in this investigation the averments stand confessed by the State."

It appeared from the averments of the pleas which were intended to answer certain allegations of the information, that the defendant company acquired and held a certain

tract of land, on a portion of which it caused to be constructed a large number of dwelling houses and tenements, to the total of twenty-two hundred and that it had laid out and maintained the usual number of streets and alleys to afford the tenants to whom it had rented said dwellings and tenement houses the proper and usual means of ingress and egress to and from their homes and places of business; that upon the same plat of ground it had caused to be erected a number of school houses, a church edifice, a hotel, a large building in which were a number of rooms constructed to be rented for dry goods, grocery and other retail stores, and other of the rooms were built for school, lecture and theater rooms and for the use of religious congregations for church purposes and that said rooms were rented for such purposes; that it had also constructed on said plat of ground a large building called "Market Hall," the lower floor of which was fitted up for meat and vegetable markets, and it had rented them for that purpose; that the upper floor is a large hall used for concerts, dances and other entertainments, and it is rented for such purposes.

It was also averred that the company maintained a system of water works and sewers, and a gas plant, and for a consideration, supplied the inhabitants of its houses with water, light and heat.

No express power to authorize such acts is relied upon by the company, but the contention was they were fully warranted by the powers derived by implication of the law. What powers are to be implied by law must, as a matter of course, depend largely upon the surrounding circumstances. With a view showing that the situation at the time justified the course pursued by the company and was sufficient to vest it with the legal right to pursue such course, the company filed pleas averring in substance that it had been for several years in the exercise of the powers conferred by its charter, and that thereafter its business increased to such an extent that it became necessary for it to build large and extensive shops in which to manufacture

cars; that a large amount of land was necessary on which to locate such shops; that it was decided to locate and build near the City of Chicago where its general office and headquarters were, and where its principal officers resided; that it found that it could not acquire a sufficient amount of land upon which to erect its shops within the City of Chicago on account of the high price of land in the city; that after diligent and careful inquiry as to the price of land and the means of access thereto it decided to build its shops where they then were, being upon a parcel of land lying between the west bank of Lake Calumet and the Illinois Central railroad; that it purchased a tract of land of about three hundred and forty-three acres, then of comparatively small value, being unimproved, low lying, not included in any municipality and not subdivided; that at the time of such purchase there were not more than twenty-five dwelling houses within a radius of two miles of said land, all of which were fully occupied; that it was impossible to get good skilled workmen to come and work at said manufacturing plant unless they could obtain houses in the immediate vicinity; that to get workmen and other employees, skilled and otherwise, at said manufacturing plant, the defendant was obliged to build a sufficient number of houses and tenements to accommodate as many as possible of its employees, and in order to attract to said manufactory the best class of skilled labor, it erected upon a part of said tract twenty-two hundred houses and tenements, and that the same were so built to induce the best class of workmen to become employed at said manufactory; that the same were so built only for the purpose of accommodating the defendant's employees, and were not built for any profit or income therefrom, but that the defendant might obtain good, skilled labor at its manufactory; that they were not a profitable investment, and were only built and held by the defendant because the same was necessary for the successful prosecution of its business. It was also alleged in the pleas, as an inducement that in order

to obtain a better class of employees, especially those with families, to work in its manufactory, it was absolutely necessary that there should be provided near their homes proper educational facilities; that to meet said demand, and to accommodate the desire of said employees that their children should receive ordinary education, defendant erected several school houses near the said dwellings, and schools were held therein; that the said school buildings were then all within the limits of the City of Chicago, and the school houses were rented to the board of education of said city; that it was necessary that certain places of divine worship should be provided near said dwellings, and to meet that demand a church was erected and furnished to a congregation using it at a purely nominal rental; that on the said tract of land, and near said dwelling houses was erected the building, the first floor of which was rented to storekeepers because when the town was built there were no stores within a reasonable distance at which the said employees could buy the ordinary necessities of life; that the defendant did not have and never had any interest in the stores, or the profits thereof; that the stores are rented at a very low rate and that said building was not built for profit, but only for the convenience of said employees; that on the upper floors of said building is a public library for the use of said employees and their families, for which no rent is charged, and the two large halls used for religious purposes are rented by the defendant at a nominal rental; that in said building are two rooms rented to the board of education of the City of Chicago for school purposes, and in which the children of said employees are taught; that in said building there is also a room erected as a lecture room and theater, provided only to give said employees and their families recreation; that no theatrical entertainments are given in said building by the defendant, but the same is furnished for the use of said employees or associations of them, and it is largely used by them for entertainments given by them and for a place in which they may practice

music; that on said land is a small building which is used as a hotel, for the purpose of furnishing accommodations to intended purchasers of defendant's cars, their agents and inspectors, that said hotel was and is a necessary part of the defendant's manufacturing plant; that the defendant has built on said ground a building known as "Market Hall," the upper story of which is a large hall furnished to the employees in which to hold entertainments, such as concerts and dancing, and on the lower floor are stores which are rented out to persons who use the same for meat markets; that in order to properly operate its manufacturing plant it became and was necessary to erect a gas plant from which it furnished light through all its manufacturing buildings, and has, upon their request, furnished gas at fair and reasonable price to certain of its employees occupying some of the houses, but that said gas so furnished said employees does not amount to ten per cent of the gas produced by said gas plant and used in the defendant's shops; that at the time of the erection of said manufacturing plant there were no water works at or near said lands, and the defendant erected a water tower and plant upon its premises principally for supplying water throughout its shops, and contracted with the village of Hyde Park for the furnishing to the defendant of large amounts of water through the water mains of said village; that most of the water passing through said water mains and said water tower is used in the shops of the defendants but a small percentage thereof is furnished to said employees in their homes; that said water is furnished said employees at a very low rate and at less than the cost thereof to defendant, and because said employees cannot in any other way procure a supply of water; that when said manufacturing plant was built, the defendant put in a large system of boilers and steam capacity probably will be required for use in operating said shops, but up to this time there has been a surplus of steam generated, and at the request of the employees steam pipes have, in a few instances, been

run to their said houses and residences, and through said steam pipes some of the houses and dwellings have been heated; that in like manner it furnished for a money consideration part of its present surplus steam and engine power to the Allen Paper Car Wheel Co. whose shops adjoin the property of the defendant; that in connection with said manufacturing plant and dwelling houses defendant set apart eighteen acres of land as recreation grounds for the use of its said employees, which includes a place for playing baseball, football, and many other kinds of athletic exercises, and for the use of such recreation grounds it charges no rental or admission fee; that said grounds are furnished with divers appliances for athletic exercises, and are free to all of said employees and their families and are used as pleasure grounds by them; there is also in connection with said manufacturing plant and dwelling houses about thirteen acres of ground used as pleasure grounds for its employees and their families and said pleasure grounds, including what is usually called a park, together with a green house and other such accessories, and defendant has established and maintained the same only for the purpose of attaching to its works the best class of skilled labor and workmen.

With respect to the sewerage system and the business of gardening or truck farming upon the sewerage farm, as charged in the information, the effect of the allegations of the pleas are, that having constructed a great number of dwellings, tenement houses and other buildings, and rented the same to its employees, it became necessary that the corporation should adopt some mode or manner of disposing of the sewerage in order to render and keep the said dwellings and buildings in a healthful condition; that it purchased one hundred and fifty acres of land in order to enable it to utilize the sewerage and refuse matter as a fertilizer, whereby to render the land productive, and that the income from the farm recompenses the corporation in part, and only in part, for the expense of the sewerage

system. The defendant by its plea admits that it does provide for people traveling on its cars, supplies of divers kinds of food and drink, including whiskies, wines, beers, and other malt and intoxicating liquors, but avers that it sells the same, under proper licenses from the State and general governments, for the purpose of meeting the necessities and demands of its patrons and contributing to their comfort, and that it makes no profit whatever therefrom, but furnishes the said supplies at a pecuniary loss to itself, and claims the right to sell them by virtue of the provisions of its charter.

The defendant's plea in regard to the fifty-five acres north of its shops, and the vacant and unoccupied lands in Pullman to the extent of sixteen acres, avers as to the fifty-five acres, they are in actual use for dumping thereon cinders and other refuse from its shops, and will be necessary in the future for the extension of the defendant's plant; as to the other vacant lands the plea admits that the defendant owns twenty-three acres of such lands, but avers that the same are the unoccupied part of a tract of sixty-three acres whereon is located its dwellings, churches, business houses, etc., which are scattered over the whole of said tract, and in such a way that no particular part of any appreciable size is unoccupied, and that the said twenty-three acres consists of spaces between said houses, that the land was purchased, and has been and is held, solely to meet the necessity of additional houses and tenements as the growth of the company's business may require, and in order that the health and comfort of its employees might be conserved by the avoidance of tenements and houses too closely crowded together.

In regard to the twenty-five acres of land near the Belt Line railroad, it is stated in the plea that many of the cars made by the defendant, and others sent to it for repairs, are delivered to the Belt Line railroad running north of its manufacturing plant; that to receive and properly store said cars while waiting their turn to be repaired and to

properly store them after being built and repaired and while waiting inspection by railroad companies, it was necessary that the defendant should have storage yards and tracts near said railroad at Grand Crossing, about three miles from the defendant's manufacturing plant, and it accordingly purchased the said tract and holds the same for the purpose mentioned; that it had not as yet put any railroad tracks upon the land, because the railroads owning tracks in the immediate vicinity have built so many side and storage tracks, which can be used for storage purposes but it will be necessary, in the near future, for the defendant to put tracks upon said lands for storage and switching purposes, and it holds said land for such use in its manufacturing business. In regard to the allegation that the defendant furnished steam power to the Allen Paper Car-Wheel Co. the plea avers that when the manufacturing plant of the defendant was built with a view of anticipating its probable future wants the company put in a large system of boilers for generating steam; that the steam power which the said boilers were capable of producing will, in the judgment of the corporation, be no more than will be required in the future for the successful operation of the machinery and appliances of the plant of the defendant, but up to that time more steam has been generated than the company's use requires, and the surplus had been furnished to the said Allen Paper Car-Wheel Co. whose shops adjoin the plant of the defendant.

The plea admits that the defendant has purchased and holds a majority of the shares of the capital stock of the Pullman Iron and Steel Co. and avers further that said company was never a competitor in business with the defendant; that its products constitute a necessary part of the material required in the construction of the cars manufactured by the defendant; that all its product is used and consumed by the defendant, and that the said corporation is in fact a mere department of the defendant in its car

manufacturing business, although existing nominally as an independent corporation.

These pleas substantially answer all the allegations of usurpation of power contained in the information. But the defendant filed another plea setting up in effect that the people were estopped from proceeding in the matter. It alleged in substance that the company had acquired the lands mentioned and built the buildings in 1880, and had conducted its business and pursued the various enterprises complained of since that time with the full knowledge and acquiescence of the plaintiff. That in 1891 the legislature of Illinois appointed a committee thereof to investigate the property of the defendant and to ascertain if it was properly taxed on all its property; that said committee examined all the defendant's property including all the property mentioned in the plea, and reported to the legislature concerning such holdings of property by the defendant, and that this property was all properly taxed, which report was accepted and approved by said legislature, whereby any fault that the defendant may have committed in regard thereto has been acquiesced in or waived by the plaintiff.

It will be seen by the foregoing excerpt that the court held that as to the office building the company had not exceeded its powers that such a building was necessary and proper for the transactions of its then business and such increase thereof as might reasonably be expected in the future. Substantially the same ruling was held in regard to the action of the company in regard to the carrying by it of stocks of liquors to be supplied to its patrons on the cars, and as to the fifty-five acres of land north of its shops, and to the twenty-five acres of land near the Belt Line Railroad, and to the furnishing of steam power to the Allen Paper Car-Wheel Co. But as to the other matters set up in its pleas it held that the company had exceeded its powers, and that such matters afforded no defense to the proceeding by the people, and the demurrers thereto should have been sustained.

As to the plea in regard to the acquiescence and waiver by the people, and therefore were estopped from further proceeding in the matter, it was conceded by the defendant, that the State, acting in its character as a sovereign, is not bound by any Statute of Limitations or technical estoppel. But it was urged, however, that in quo warranto, under the common law rule the courts, in the exercise of their discretion, had power to grant the writ or not, or upon a final hearing, refuse aid when the conditions complained of had existed a number of years with knowledge on the part of the sovereign. It is a general rule that laches, acquiescence, or unreasonable delay in the performance of a duty on the part of the officers of the State, is not imputable to the State when acting in its character as a sovereign. There are exceptions to this rule, but the court was unable to see that the allegations of the plea brought the case within the principles of any of the exceptions.

The court cites a number of cases in support of its position. In relation to the implied powers of a corporation it is said that implied powers could not be invoked to authorize a corporation to engage in collateral enterprises but remotely connected with specific purposes it was created to accomplish. A power which a corporation may exercise by implication must be bounded by the purposes of the corporate existence, and the terms and intentions of the charter, and acts which tend only remotely and by indirection to promote its interest and chartered objects cannot be justified by implication of law, but are *ultra vires*. The prohibition of the law against unauthorized exercise of power by a corporation is based upon grounds of public policy, and the wisdom of the rule may here find exemplification. Conceding the rectitude of the purpose which is alleged operated to induce the acts of the corporation which resulted in the creation of the town or city of Pullman, the court was constrained to declare the corporation had not lawful power to perform such acts, and that the existence of a town or city where streets, alleys,

school houses, sewerage system, hotels, churches, theaters, water works, market places, dwellings and tenements are the exclusive property of a corporation is opposed to good public policy and incompatible with the theory and spirit of our institutions.⁵⁴

In this State a corporation may be organized to transact any lawful business, and own the real estate necessary for the transaction of its business, but it may not be organized for the purpose of owning real estate, and do the necessary business incidental to its ownership.

So it may not be organized to buy or lease land for the purpose of erecting thereon an office or apartment building to be rented to tenants, although the purpose of its organization may also be to furnish power, heat, light and water to its tenants.⁵⁵

Under the general statute of Illinois, a corporation, except as above limited, may not hold the title of real estate as trustee; neither can a foreign corporation do so, although authorized so to act by the laws of the State of its organization.⁵⁶

The same principle was held in a number of other cases, and it was also held that a court of chancery had no power to decree the sale of property devised by a will to a corporation, and direct the payment of the proceeds to the devisee.⁵⁷

(2) Forfeiture by alienation to aliens, and the present law in regard thereto in this State is fully considered herein in the chapter on Aliens, to which reference is made.

(3) In regard to forfeitures by alienation of an estate greater than the grantor is authorized to make or greater than his right or interest in the thing conveyed, it may be said the doctrine is unknown in Illinois. It cannot be said

54—*People v. Pullman Palace Car Co.*, 175 Ill. 125.

55—*People v. Shedd*, 241 Ill. 155.

56—*United States Trust Co. v. Lee*, 73 Ill. 142.

57—*Starkweather v. American Bible Society*, 72 Ill. 50; *First M. E. Church v. Dixon*, 178 Ill. 260; *National H. B. & L. Assn. v. Home Savings Bank*, 181 Ill. 35.

that if one person attempts to defraud another, however immoral or reprehensible the act, such person forfeits his property to the other. So where a person holds a life estate, he does not forfeit it by attempting to cut off the remainder.⁵⁸

The conveyance of a greater estate than the grantor holds is not a forfeiture of his interest in the premises, but it operates to convey whatever interest he had in the premises.⁵⁹

The criminal code provides: "Any person, after once selling, bartering or disposing of any tract or tracts of land, town lot or lots, or executing any bond or agreement for the sale of any lands, town lot or lots, or who shall again knowingly and fraudulently sell, barter or dispose of the same tract or tracts of land, or town lot or lots, or any parts thereof, or shall knowingly or fraudulently execute any bond or agreement to sell or barter, or dispose of the same land, or lot or lots, or any part thereof, to any other person for a valuable consideration, shall be imprisoned in the penitentiary not less than one year nor more than ten years."⁶⁰

"Every person who shall be a party to any fraudulent conveyance of any lands, tenements or hereditaments, goods or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment or execution, contract or conveyance had, made or contrived with the intent to deceive and defraud others, or to defeat, hinder or delay creditors or others in their just debts, damages or demands, or who, being a party as aforesaid, at any time shall wittingly and willingly put in use, avow, maintain, justly or defend the same or any of them as true, and done, had or made in good faith, or upon good consideration, or shall sell, alien or assign any of the lands, tenements, heredita-

58—Blue v. Blue, 38 Ill. 9.

60—Sec. 121, Ch. 38, R. S.

59—McVey v. McQuality, 97 Ill. 93,
Sec. 1205.

ments, goods, chattels, or other things before mentioned, to him conveyed as aforesaid, or any part thereof, shall be fined not exceeding \$1,000." ⁶¹

Forfeitures by non-presentation to a benefice, by simony, by breach of copy-hold customs are unknown in this State, and it can hardly be said that bankruptcy works a forfeiture. In this country the property of a bankrupt goes to pay his debts, and a proceeding against a bankrupt, and taking his property thereunder, is substantially the same kind of a proceeding as a sale of defendant's property on execution.

§ 1206. Forfeiture for Breach or Non-Performance of Conditions—Another kind of forfeitures are those by breach or non-performance of conditions annexed to the estate, either expressly by deed at its original creation, or impliedly by law from a principle of natural reason. Estates on condition are such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, enlarged or finally defeated. ⁶²

Estates upon conditions are of two kinds: (1) Estates upon conditions implied by law, and (2) estates upon conditions expressed.

(1) Estates upon conditions implied by law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition is expressed in words. The most familiar illustration of this kind of estate on condition is that of a franchise. The grant of a franchise to a corporation is always upon the implied condition that the grantee shall act up to the end or design for which they are incorporated, and any misuse or non-use of corporate privileges will render them liable to forfeiture as a condition broken. The State alone can take advantage of a breach of the condition, and it must be done by a proceeding instituted directly for that

⁶¹—Sec. 122, Ch. 38, R. S.

⁶²—2 Black. Com., 281.

purpose, and not in any collateral or incidental proceeding.⁶³

(2) Estates upon condition expressed in the grant itself is, where an estate is granted, either in fee simple or otherwise, with an express qualification annexed to it, whereby the estate granted shall either commence, be enlarged, or be defeated upon performance or breach of such qualification or condition.

No particular form of words is absolutely essential to create a condition, but it is essential that the intention to create it shall be clearly shown by some words.⁶⁴

These conditions are divided into two classes: (1) Conditions precedent, and (2) Conditions subsequent.

(1) Precedent conditions are such as must happen or be performed before the estate can vest or be enlarged; thus, if a life estate be limited to A upon his marriage with B, the marriage is a condition precedent and until that happens no estate is vested in A. Or if a man grants a term for years, and provides that upon the payment of a certain sum of money within the term by the grantee then he shall have the fee, this is a condition precedent, and no estate in fee passes till the money is paid.

Where an instrument is to become effective upon a condition precedent, there must be evidence of the performance of the condition before it can become effective.⁶⁵

(2) Conditions subsequent are such as where the estate vests immediately and is divested only on the breach of the condition.

Conditions subsequent are provisioned in the deed, giving the grantor, by express words or necessary implication, the right to re-enter and re-possess the premises upon the violation of the provision.⁶⁶

An illustration of this kind of condition is where a man

63—2 Black. Com., 153.

66—Koch v. Streuter, 232 Ill. 594.

64—Koch v. Streuter, 232 Ill. 594.

65—Stumpf v. Osterhage, 111 Ill.

grants an estate in fee simple, reserving to himself and his heirs a certain rent, and if such rent be not paid at the times limited, it shall be lawful for him or his heirs to re-enter and avoid the estate; in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed.

To this class may also be referred all base fees. And on a breach of any of the subsequent conditions, the estate which was vested in the grantee is wholly determined and void.

Parties may annex to their contracts and deeds their own conditions, so that they are not against the policy of the law. A condition in a deed may be annexed to every species of estate or interest in real property—to an estate in fee, entail for life or years, in lands and tenements.⁶⁷

Where a party has no present estate in the land, but only an expectancy, no estate will vest in him until the happening of the event on which the expectancy is based.⁶⁸

Where a grant of land is conditioned that the grantee shall do several things, though the instrument contains no agreement by the grantee to do them, but declares that any neglect or failure to perform shall forfeit the estate, and that in such case the conveyance should be void and the estate conveyed revert and immediately vest in the grantor, such provisions amount to conditions subsequent and not to covenants on the part of the grantee. The grantor has the right to make the conveyance on such lawful terms as he shall see fit, and both parties have the right to have it enforced according to its terms. Under a deed containing such conditions the only right of the grantor, on a breach of them, is that contained in the deed,—a forfeiture of the estate and its re-investment in the grantor; he has no right of action for damages. A condition differs from a covenant. The legal responsibility

⁶⁷—*Wynkoop v. Cowing*, 21 Ill. 570. ⁶⁸—*Cummings v. Lohr*, 246 Ill. 577.

for the non-fulfilment of a covenant is that the party violating it must respond in damages. The consequences of a non-fulfilment of a condition is a forfeiture of the estate. Where the terms of the instrument are plain and unambiguous, and its meaning is clear, there is no reason why the contract made by the parties should not be enforced.

A waiver of forfeiture may be by parol even though the instrument providing therefor is under seal, and where the grantor does any act which is inconsistent with his reliance upon the condition, his act amounts to a waiver of the condition so as to preclude him from afterward availing himself of the forfeiture.⁶⁹

§ 1207. Estates by Limitation—There is a class of estates, *germain* to estates on condition, which are designated by the term of estates by limitation. A distinction is drawn between a condition in a deed and a limitation, which is denominated as a condition in law. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for a longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation; as when the land is granted to a man until out of the rents and profits he shall have received a certain amount of money, the estate terminates as soon as he has received such sum, and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy; however, when an estate is upon condition in a deed, the law permits it to endure beyond the time when the contingency happens, unless the grantor, or his heirs, or assigns, take advantage of the breach of condition, and either make an entry or a claim in order to avoid the estate. Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate is limited over to a third per-

⁶⁹—Sanitary District of Chicago v. Chicago T. & T. Co., 278 Ill. 529.

son, and does not immediately revert to the grantor, or his representatives, this the law construes to be a limitation and not a condition; because if it were a condition, then, upon a breach thereof, only the grantor or his representatives could avoid the estate by entry, and so the remainderman might be defeated by the neglect of the grantor to enter; but, when it is a limitation, the estate of the grantee determines, and that of the remainderman commences, and he may enter the lands the instant that the failure happens.

The material distinction between a condition and a limitation is that a breach of a condition does not defeat the estate until an entry is made by the grantor or his heirs; but it is in the nature of a limitation to determine the estate when the period of limitation arrives, without entry or claim, and no act is required to vest the right in him who has the next expectant interest. Were it otherwise, the grantor or his heirs might defeat the limitation over, by refusing to enter for a breach of the condition.

A conditional limitation is of a mixed nature, and partakes both of the nature of a condition and of a limitation. An illustration of this is given: As if an estate be limited to A for life, provided that when C returns from Rome it shall thenceforth remain to the use of B in fee. It partakes of the nature of a condition, inasmuch as it defeats the estate previously limited, and is so far a limitation, and to be distinguished from a condition, that upon the contingency taking place the estate passes to a stranger without entry, contrary to the maxim of the law, that a stranger cannot take advantage of a condition broken.⁶⁶

In all these instances, of limitations or conditions subsequent, so long as the condition, either expressed or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold provided the estate upon which the condition is annexed be in itself a freehold. For, the breach of the conditions being contingent and uncertain, this uncertainty preserves the freehold; because the estate is capable of lasting forever, or at least for the

life of the tenant, supposing the condition remain unbroken.

Where, however, the estate at its utmost is a chattel interest, and must determine at a certain time, it is not ranked among estates of freehold.

§ 1208. Validity or Invalidity of Conditions—If the expressed conditions be conditions subsequent, and be impossible at the time of their creation, or afterwards become impossible by the act of God or the act of the freeholder himself, or if they be contrary to law, or repugnant to the nature of the estate, they are void.

In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate becomes absolute in the tenant. For he has the grant of the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant.

But if the condition be precedent, or to be performed before the estate vests, the estate which depends thereon is also void, and the grantee shall take nothing by the grant; for he has no estate until the condition is performed.⁷⁰

These provisions of the common law prevail to a great extent in Illinois and affect our system of conveyancing, and a review of the Illinois authorities on this subject will be profitable. And while we are on this subject the law in regard to conditions may with propriety be fully examined.

Where the condition in a deed is contrary to good morals, or in antagonism with a statute or the common law, or against public policy, it will be held to be invalid, and the estate will be relieved from it.

It is not the interest of the parties alone which is to be considered the true test, but in each particular case, under the facts, the judicial inquiry is, will the enforcement of the condition be inimical to the public interest. Whatever tends to injustice or oppression, restraint of liberty, re-

⁷⁰—2 Black. Com., 153-7.

straint of legal right, to the obstruction of justice, violation of statutes, the obstruction or perversion of the administration of the law; whatever tends to interfere with the control or administration of the law as to executive, legislative or other official action, whenever embodied in and made the subject of a contract, the contract is against public policy and therefore void, and not susceptible of enforcement; as for instance, an agreement to withdraw an election petition in consideration of money, an agreement to obtain a pardon, contracts for services known as lobby services, an agreement to resign a public office in favor of another and using influence to appoint the latter as his successor, conditions in general restraint of marriage, procuring a nolle prosequere from the governor, to prevent competition in a bidding for government contracts, these have all been held contrary to public policy and void. But when the condition is made in good faith and stipulates for nothing that is *malum in se* or *malum prohibitum*, before the court should determine the condition to be void, as contravening public policy, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, and not theoretical and problematical. So it has been universally held that conditions in deeds restraining the grantee from selling intoxicating liquors on the premises, and an agreement not to run a stage coach on a certain road, and a condition that the party would not at any time thereafter, own, run or be interested in any line of packet boats on the Erie canal, a condition that a school house should not be erected on the premises or a distillery, or a machine shop for iron manufactory, or a cemetery or that the premises conveyed should not be used as a hotel, or for the manufacturing of resin oil, and a condition that the grantee should have the exclusive right to sell beer to any public house erected on the land, and that the premises should not be used as a public house, and in a deed to a county on the express condition that the county would erect thereon within five years,

a court house for the use of said county have all been held valid conditions. And so it was held that a condition in a deed that no building shall be erected on any part of the land conveyed in which to handle grain that no grain shall ever be handled on said land by the grantee therein his grantee, administrator, executor, assigns or lessees, or by any one holding by, through or under him; and if the agreement is broken, said land shall revert to the grantor, on a breach of the condition it was held that the grantor might recover in ejectment.⁷¹

The validity of a condition subsequent depends upon its being such as the law will allow to divest an estate, for, if the law deems the condition void as against public policy, then the estate will be absolutely free from the condition.

And the rule is not different if it should be regarded that the proceeding were one to require the re-conveyance of the property, on account of a want or failure of consideration. A court of equity will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of doing that which is illegal; and when such a contract has been executed by one of the parties by conveying real estate, a court of equity will not, in general, interfere, but will leave the title of the property where the parties have placed it.

Where a party to an illegal or immoral contract comes himself to be relieved from the contract, or its obligations, he must distinctly and exclusively state such grounds of relief as the court can legally attend to, and he must not accompany his claim to relief, which may be legitimate, with other claims and complaints which are contaminated with the original immoral purpose for if he sets up, as a ground for relief, the non-fulfilment of the illegal contract on the other side, and thereby he is released from his

71—Wakefield v. Van Tassell, 202
Ill. 41.

obligation to perform it, that shows that he still relies upon the immoral contract and its terms of relief, and therefore the court will refuse it.

So where there was a conveyance of property to the trustees of a railroad in which there was a condition that no depot should be erected within three miles of a certain village, it was held that such a condition was contrary to public policy, and a bill by the grantors to forfeit the property on account of the violation of the condition was dismissed.⁷²

In case of *Lyman v. The Suburban Railroad Co.*, 190 Ill. 320, a bill in equity was filed praying that all rights, privileges and easements heretofore granted by the trustees of the Grant Land Association of Chicago to the Chicago and Southwestern Railway Co. and now claimed by the defendants in certain premises therein described be decreed to be terminated and that the same be vested in the complainant as trustee of said association, and that the said complainant as such trustee be decreed to hold the same free and clear of any and all claim thereto by the defendants and that all personal property placed thereon be removed and that the defendants be restrained and enjoined from in any way interfering with the complainant in the exercise and use of said premises. To this bill a general demurrer was filed and sustained by the court.

The condition in the grant to the railroad company was that it was made upon the express agreement and understanding that the company would construct, operate and maintain the railroad and perform all the conditions and provisions contained in the grant on its part to be performed as therein granted and that a failure so to do it should forfeit all its rights thereunder. And one of the conditions was that the company should erect two depots at certain designated localities.

72—*St. Louis, J. & C. R. R. Co. v. Mathers*, 71 Ill. 592.

The breaches assigned were that the company had not maintained its railroad nor erected the depots as designated. It was argued that the stipulation to erect and maintain the depots was void. In this regard it is said, that agreements of the character mentioned are of three classes. Where those in which stipulations are contained providing for the location of stations or depots at particular places and prohibiting the location or erection of any others within certain limits. Concerning all such agreements, they are uniformly held to be void, as against public policy. Another class of cases are those in which some officer or other person, supposed to be influential with the railroad company, undertakes, for a consideration moving to them, to secure the location of stations, depots at a particular place. All such contracts are void, as against public policy. Still another class is that to which the case under consideration is allied. Such are the cases in which an agreement has been made between an individual and a railroad corporation for the location of a station or depot at a particular place, in consideration of the donation of money or property to the corporation, without any restriction or prohibition against any other location. It has been held that an agreement to pay a railroad company a stipulated sum in consideration that it would locate its route at a particular place is valid and may be enforced. Such an agreement is not in contravention for public policy. The construction and operation of the railroad for a short term of years does not fulfill the conditions of the agreement.⁷³

§ 1209. Doubtful Conditions Construed as Covenants—If from the language employed it is doubtful whether the clause is a condition or a covenant it will be construed as a covenant. The rule that where a clause is susceptible of different constructions, that construction will be adopted

⁷³—Lyman v. Suburban R. R. Co.
190 Ill. 320.

which is most favorable to the grantee obtains in such cases.⁷⁴

In construing deeds, courts will always incline to interpret the language as a covenant, rather than a condition.⁷⁵

§ 1210. Lands Granted for a Particular Purpose—Where land has been granted upon condition that it be used for a particular purpose, it would undoubtedly revert to the grantor when it ceased to be so used.

But it is competent for the legislature to make it condition precedent to the location of a county seat upon the land of any individual that he should convey the land in fee simple absolute to the county. The owner was not obliged to accept the proposition, but having done so, and made his deed accordingly, he cannot complain that the legislature, to promote the public good, and in the exercise of an undoubted right, subsequently provides for a change of the county seat.⁷⁶

Where a deed conveys lands to be used for school purposes, and the school trustees have advertised the land for sale, a bill will lie by the grantor to restrain the sale. A fair construction of the deed is, that the land shall be held and used for school purposes, and not that it may be sold, and the money used for school purposes. If the land were sold and used for some other purpose, then the land would be used for other than school purposes, contrary to the use declared in the deed.⁷⁷

§ 1211. Distinction Between Conditions Precedent and Subsequent—The distinction between conditions precedent and conditions subsequent is obvious in its consequences, but it is not always easy to determine which of such conditions the words of a particular devise or conveyance create. There are no technical words to distinguish them.

74—Koch v. Streuter, 232 Ill. 594.

76—Harris v. Shaw, 13 Ill. 457.

75—Board of Education v. Trustees
First B. Church, 63 Ill. 204; Boone
v. Clark, 129 Ill. 466.

77—Trustees of Schools v. Braner,
71 Ill. 546.

The distinction is a matter of construction. The same words have been construed differently, depending on the connection in which they are used.

If the act or condition required does not necessarily precede the vesting of the estate but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evident that the intention of the parties was that the estate should vest and the grantee perform the act or acts after taking possession, then the condition is subsequent.

When the words are of a doubtful meaning, the courts prefer to construe the conditions as conditions subsequent rather than precedent, so as to give a present estate, liable to be divested, rather than defer the vesting of the estate.

The whole instrument must be construed together.⁷⁸

§ 1212. Conditions Construed in the Light of Surrounding Circumstances—In a deed conveying certain premises to the grantee was a certain clause reciting certain requirements on his part and concluding with the expression that “the performance of said covenants is hereby made a condition precedent to the vesting of title to said premises.” In construing this deed it was said that construing this clause in the light of surrounding circumstances and in connection with the entire instrument, it was clearly intended to mean that the title should vest at once, but that the grantee should not have an absolute, indefeasible title until he had performed all the conditions set out in the instrument. To construe the clause in question otherwise would be to render the instrument nugatory. This the law will not permit, if it can be avoided without doing violence to well established rules.

It has frequently been held that the decision of a question does not depend so much on artificial rules of con-

78—Phillips v. Gannon, 246 Ill. 98.

struction as it does on the application of good sense and sound equity to the spirit of the contract in question.⁷⁹

The intention of the parties must be determined from the language of the deed itself, considered in connection with the surrounding circumstances at the time the deed was executed, and where the deed provides that only a single dwelling is to be placed on the lot, it is questionable whether the word "single" applies to the building itself, or to the use which shall be made of the building when completed. It was the conclusion of the court that the word referred to the building and not to the use of the building, and therefore a decree dismissing the bill for want of equity, which was filed to enjoin the erection of a flat building on the lot was affirmed.⁸⁰

A deed which contained the provision that "this conveyance shall not take effect until the plat of this town of Topeka shall be recorded, but shall take effect from such recording," requires more than the mere spreading a plat on the county records. The requirement is only satisfied when the plat is made, acknowledged and recorded in the manner required by the statute so as to become valid and binding as a town plat, and to have that effect all the requirements of the statute must be substantially complied with, and it was such a plat that the deed required.

The plat not having been recorded, as required by the deed the condition has not been performed, and the title has never vested in the grantee.⁸¹

Whether the condition be precedent or subsequent a substantial compliance with it is all that is required for its fulfilment.⁸²

The word "Provided" is an apt word to express a condition. While this is not its fixed and invariable meaning, it will be so taken, unless a different intent appears from the context and an examination of the whole instrument.

79—Phillips v. Gannon, 246 Ill. 98.

81—Thomas v. Eckard, 88 Ill. 593.

80—Hutchinson v. Ulrich, 145 Ill.

82—Wilson v. Galt, 18 Ill. 431.

So a will devising the estate of the testator to his wife "provided she remains my widow, but should she marry, then all the property shall go to my children that are alive, except one-third which she is to have during her life," passes to the widow a base fee, conditioned upon her remaining the widow of the testator.⁸³

§ 1213. Time the Essence of the Contract—The general rule in equity is, that time is not necessarily deemed of the essence of the contract, unless the parties have expressly so regarded it, or it necessarily results from the nature and circumstances of the contract. But the parties may make time the essence of their contract, and when this clearly appears to have been their intention, and no particular circumstance has intervened to excuse a strict performance, it must be so considered and treated in equity. The right to make such agreements cannot be denied, and it is the duty of courts to enforce them as made, and not to make new contracts for the parties. The real intention of the parties must govern, and that is to be ascertained from the contract and surrounding circumstances.⁸⁴

Precise words, by which time of performance is made an essential part of the contract, are unimportant.⁸⁵

§ 1214. Conditions as Shifting Uses—Where the fee in the first taker created by a deed is made determinable as upon the happening of a valid condition subsequent, followed by a limitation over of the fee or use to another upon the happening of the prescribed event, the fee or use shifts from the first to the second taker, whereby the deed is a conveyance under the Statute of Uses, it is a clear case of a shifting use.⁸⁶

§ 1215. Conditions Sometimes Construed as Creating Trusts—While a clause in a deed may not amount to a con-

83—Cummings v. Lohr, 246 Ill. 577.

84—Smith v. Brown, 10 Ill. 309;
Kemp v. Humphreys, 13 Ill. 573;
Morgan v. Herrick, 21 Ill. 481; Wyn-

koop v. Cowing, 21 Ill. 570; Bostwick v. Hess, 80 Ill. 138.

85—Milnor v. Willard, 34 Ill. 38.

86—Abbott v. Abbott, 189 Ill. 488.

dition subsequent, yet it may create a trust, binding on the grantee and all subsequent purchasers with notice. The authorities seem to be unanimous that where a conveyance is made of real estate upon condition that the grantee shall pay a specified sum of money to a third person, or pay the debts of the grantor, or of some third person, the acceptance of the conveyance by the grantee with such a clause in the deed, creates a covenant on the part of the grantee to discharge the obligation, and creates the relation of trustee and cestui que trust, between the grantee and the person for whose benefit the payment is to be made, without any act or assent on the part of the beneficiary. And where such a provision is found in a deed in a chain of title, it follows the land into the hands of subsequent grantees.⁸⁷

§ 1216. Conditions as Covenants Running with the Land—A condition in a deed that the grantee will pay the grantor a certain sum of money on the first day of each and every month during the life of the grantor, which payments were made a charge and lien on the lot, runs with the land and is a continuing charge upon it, into whose hands soever it may come, and the payment of the money so reserved is an obligation which a court of chancery will enforce.⁸⁸

§ 1217. Power of Courts of Equity to Supply Defects in Deeds on Condition—Although a condition in a deed is unchangeable, except by the consent of the parties, yet a donation of land for a site for a public school, is a donation for charitable purposes and in such case a court of equity have power to supply all defects in a conveyance. So where a person offered to donate the land for a public school site, which offer was accepted by the school directors, who spent a large sum of money in the erection of a school house on

87—Koch v. Streuter, 232 Ill. 594.

88—Pozzin v. Pozzin, 110 Ill. Ap.

the land, and in fulfillment of his promise the party executed a deed of the land, but included a clause that the deed was made for the benefit of white people, only, and when the land ceased to be used for school purposes it was to revert to the grantor. It was declared to be the duty of the grantor to execute a deed as had been agreed upon, and a decree to that effect was upheld by the Supreme Court.⁸⁹

§ 1218. Conditions, Provisos and Limitations Repugnant to the Granting Clause—It is a well settled principle in the construction of conveyances, that all conditions, provisos and limitations which are repugnant to the grant are to be regarded as inoperative and void. These general propositions are so elementary in their character that it is to be presumed that they are understood by all who can justly lay claim to a general knowledge of the rudiments of the law.⁹⁰

But this broad and general expression of the rule at common law has been somewhat modified by our statute on Conveyances, so that where a deed is drawn substantially in the form therein provided, every word used in a deed so drawn no matter in what part of the deed it may be found, is to be given full weight in construing the instrument.

The rule of law that where there is a conflict between the granting clause in a deed or other document affecting real estate, and subsequent conditions, provisos and limitations, then such conditions, provisos and limitations are to be regarded as inoperative and void, is fully reviewed and considered, in connection with sections 9 and 13, sections of the Conveyance act by our supreme court in the case of *Bauman v. Stoller*, 235 Ill. 480.

The deed was in the statutory form, in which the premises were "conveyed and warranted" to the grantee, but

⁸⁹—*Price v. School Directors*, 58 Ill. 452.

⁹⁰—*Donlon v. Bradley*, 119 Ill. 412.

immediately following the description of the property, there was inserted a clause that the grantee "shall not have power to reconvey this land unless it be to the grantors. He shall not have power to mortgage the land, and in case the said Frank Doyle (the grantee) should die before his wife dies and any children survive him, the surviving children and his wife shall have the use of said land above described during the lifetime of his wife, when it shall go to his children, if any are living, but if at the death of the grantee no children survive him the title shall be in the grantor. Should any children survive the grantee and his wife also survive him, she shall have no interest in the land only so long as she remains unmarried and is his widow."

At the time of the trial Frank Doyle had twelve or thirteen children, several of whom were minors. It also appeared that Frank Doyle (the grantee) afterwards obtained another deed from the grantor, which was an ordinary warranty deed, and which contained a statement to the effect that it was made for the purpose of removing the restriction contained in the first deed and gave Frank Doyle an absolute title.

It was conceded that Lawrence Doyle, the grantor, was the owner in fee of the property in 1882 when he first conveyed it to Frank Doyle, and the only question was, whether the circuit court erred in passing on propositions of law involving a construction of the deed executed by him in 1882 to Frank Doyle. That court held, in accordance with the contention of the appellee, that by that deed a contingent interest in the real estate therein described was conveyed to the children of Frank Doyle, and that the latter deed could not effect that interest, while the appellant contended that under the first deed Frank Doyle acquired title in fee simple to the premises. That deed was drawn on a printed blank form prepared to accord with section 9 of chapter 30, of the Revised Statutes of 1905.

Appellant's theory is, that the words "convey and warrant" found in the granting portion of the deed, vested a

fee simple title in Frank Doyle, and that the words by which an interest was given to the children were repugnant to the words "convey and warrant," and being found in a portion of the deed succeeding the premises, are without effect, and the deed is precisely as though the words of attempted limitations were not written therein at all.

Section 9, *supra*, provides that every deed which is, in substance, in the form set out in that section shall be deemed and held a conveyance in fee simple to the grantee, his heirs or assigns, with certain covenants unnecessary to be here repeated. Section 13, of the same act is in words as follows: "Every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law."

Appellant argues that the words of this section, "if a less estate be not limited by express words," have no application to a deed prepared in the form set out in section 9, for the reason that section 9 makes the words "convey and warrant" equivalent to the words which were "necessary to transfer an estate of inheritance" prior to the enactment of section 13, and the deed, therefore, is as though such "necessary" words were actually used in the granting clause. And cited a number of cases in support of his contention, which the court reviews.

The case of *Wolfer v. Hemmer*, 144 Ill. 554, a testator by one clause of his will devised to his wife, "her heirs and assigns," certain real estate. By a subsequent clause it was contended that he attempted to cut down the estate so devised to her. It was there held that section 13 had application only where "words heretofore necessary to transfer an estate of inheritance be not added," and that as to the real estate devised by the earlier clause, section 13 had no application, because the words of devise used in that clause

were those which prior to the passage of the statute were the precise words necessary to transfer an estate of inheritance.

In *Palmer v. Cook*, 159 Ill. 300, a deed was drawn substantially in the form set out in section 9. It ran to two grantees and concluded, after the description of the land and the reservation of a life estate in the grantor, with the words "And further, in case either of the grantees dies without an heir, her interest to revert to the survivor." In that case the court refused to apply section 13, saying that the deed effected an absolute fee simple conveyance by the first clause thereof and vested the estate, and that the language above quoted was inoperative, because it was an attempt to place a limitation on the fee conveyed by the words found in the premises of the deed. This case supports the appellant, but as we will hereafter point out, it is in conflict with the latter case of *Cover v. James*, 217 Ill. 309, and must therefore yield to the latter.

In *Walker v. Shepard*, 210 Ill. 100, the words of attempted limitation follow the description in the deed, which was in the statutory form, and they were held inoperative, not because the estate granted by the words "convey and warrant" could not be made an estate less than the fee by words following the premises of the deed, but because the words which followed did not amount to a limitation upon the estate otherwise conveyed, but were merely an indication of the intention of the grantor that the grantee should not dispose of the property during her lifetime, it being said that the words contained in a deed merely expressive of the purpose animating the grantor in making it were not sufficient to limit the estate conveyed. The power of the grantor, however, to limit the conveyance made by a deed prepared in the form with that set forth in section 9, by words found in the portion of the deed following the description of the real estate, was expressly recognized in these words "The words of grant, 'convey and warrant,' convey the fee unless they are limited to a

lesser estate by words found in the granting clause, or in the habendum of the deed, if it contained an habendum. They may be used, however, in conveying a life estate or an estate for years limiting the estate conveyed to an estate of the character of either of the two last mentioned are not inconsistent with such words of grant; and where there is language, either in the granting clause or in the habendum of the deed, limiting the estate conveyed by such granting words to one less in extent than a fee, such words of limitation will take effect."

We regard the law as stated in *Cover v. Jones*, *supra*, as decisive of this controversy. In that case the grantor, by a deed substantially in the form provided by section 9, conveyed to A. Ford Cover and Bessie Cover certain real estate, using only the words "Convey and warrant" in the granting clause and following the description with this language: "In case of the death of either A. Ford Cover or Bessie Cover, the other to have the whole of said property without litigation." It was contended on the one side that the quoted words were without effect and on the other that in the construction of the deed these words should be given their literal meaning. The question was discussed at some length in the opinion, *Palmer v. Cook*, *supra*, being again considered, and it was said in reference to the deed in the *Palmer* case: "Merely because the deed was substantially in the form prescribed by section 9, however, a fee simple title was not necessarily conveyed. The section prescribes the form of the deed, and provides that every deed substantially in that form shall be deemed and held to be a conveyance in fee simple to the grantee; but it must be construed in connection with section 13, *supra*, under which, if a less estate be limited by express words or appear to have been granted, conveyed or devised by construction or operation of law, the conveyance, not using words heretofore necessary to transfer an estate of inheritance, shall not be deemed to convey a fee simple estate." The conclusion reached was that the words following the description of the

real estate in the Cover deed were a limitation upon the title, which otherwise would have been conveyed by the deed.

Manifestly, the purpose of the legislature in enacting section 13, was to require that every word used in a conveyance, no matter in what part found, should be given weight in construing the instrument, where the party making the conveyance did not use words of grant or devise, which at common law, would have conveyed an estate of inheritance. The doctrine by which words in some part of a deed following the premises, which apparently cut down or reduced the estate conveyed by the words of grant, should be regarded as repugnant to the words of conveyances has no application where the granting words are not such as would at common law convey an estate of inheritance. Such being the legislative intent, *Cover v. Jones*, and the cases upon which it rests, should be followed rather than *Palmer v. Cook*. The phrase, "if a less estate be not limited by express words," found in section 13, must apply to a deed drawn in accordance with section 9, where the only granting words are "Convey and warrant."⁹¹

§ 1219. Conditions Subsequent Are Not Favored in Law, and are construed strictly, because they tend to destroy estates: and a rigorous execution of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience. In illustration of the rule, it has been held, that where the condition is personal to the grantee, as that he shall not sell without leave his executor not being named in the condition, may sell without incurring a breach.

It is a general rule, that such conditions annexed to estates as go in defeasance and tend to the destruction of the estate, being odious to the law, are taken strictly, and shall not be extended beyond their words, unless it be in some special cases. And therefore, if a lease be made, on condition that if such a thing be not done, the lessor (without

91—*Bauman v. Stoller*, 235 Ill. 480.

any words of heirs, executors, etc.) shall re-enter and avoid it, in such case the heir, executors, etc., of the lessor shall not take advantage of the condition. So if one makes a lease for years of a house, on condition that if the lessor shall be minded to dwell in the house, and shall give notice to the lessee, he shall depart, in such case, if the lessor die, his heirs, executors, etc., shall not have the like advantage and power as the lessor himself, for the condition shall not extend to them. And hence it is, that if a lease for years be made, on condition that the lessee shall not alien without the license of the lessor, the restraint shall continue during the lives of the lessor and lessee, and no longer. And where there is a condition in the lease that the lessee shall not sell or assign, the sale by the assignee in bankruptcy of the lessee, or under an execution or other assignment in law is held to be no breach of the condition. So a condition in a lease that the lessee shall not sell or assign his lease without the license of the lessor, where the assignment is made by license of the lessor, no subsequent alienation is a breach of the condition, nor does it give the right of re-entry to the landlord. A license to one lessee is a license to all, or a license to alienate a part of the demised premises is a license to alienate the entire premises.

While most of the cases cited by the court refer to forfeiture of leases, the same rule applies to conditions in deeds conveying the fee. The right of protection in one is as sacred in the eye of the law as the other.⁹²

As a general rule courts of equity will not lend their aid to divest the title to an estate for a breach of a condition subsequent, but where compensation can be made in money, it will relieve against such forfeiture and compel the party complaining to receive a reasonable compensation in money.⁹³

92—*Voris v. Renshaw*, 49 Ill. 425.

93—*Gallaher v. Herbert*, 117 Ill.

§ 1220. Provision for Re-Entry in Deed—A provision in a deed for re-entry in case of a breach of conditions usually indicate an intention to create a condition subsequent, and while such a provision is not indispensable it is always important as evidence of an intention to impose such a condition.⁹⁴

One of the most important considerations in determining whether a clause is a condition subsequent or something else, is the presence or absence of the "re-entry clause" by the grantor or his heirs, or of forfeiture of the estate for a breach of the condition. And it is said if the clause can be construed as an obligation to abstain from doing the thing described, which, by the acceptance of the deed, becomes binding on the grantee as an agreement, enforceable in behalf of any interest entitled to invoke its protection, then in conscience the court is bound to give it that construction, and thereby place itself in accordance with that inclination of the law, which regards with disfavor conditions involving forfeiture of estate. And the absence of the re-entry clause left the matter open to construction. Such a clause usually indicates an intention to create a condition subsequent.⁹⁵

§ 1221. Re-Entry Confined to Grantor or His Heirs—A breach of the condition does not defeat the estate until an entry is made by the grantor or his heirs. The estate can only be defeated by the actual entry of the grantor or his heirs, and they are the only parties who can avail themselves of the breach. Their grantees, or a stranger, cannot take advantage of the breach of a condition subsequent, and they acquire no right to enforce it.⁹⁶

A non-compliance with a condition subsequent does not of itself, determine the estate, as the right to enforce a forfeiture may be waived. Notwithstanding the breach, the

94—Phillips v. Gannon, 246 Ill. 98.

95—Koch v. Streuter, 232 Ill. 594; 63 Ill. 204; Waggoner v. Wabash R. Star B. Co. v. Primas, 163 Ill. 652; R. Co., 185 Ill. 154.

Kew v. Trainor, 150 Ill. 150.

estate abides in the grantee until it is defeated and determined, at the election of the grantor or his heirs. This election may be signified by a re-entry, or by some act equivalent to a re-entry. Where a corporation holding land under a deed containing a condition subsequent, is dissolved for acts or omissions, which are also breaches of the condition, the title will revert to the original donor, without any act on his part, and no re-entry or other equivalent act need be shown. The dissolution of the corporation by a judicial decree or judgment supersedes the necessity of any re-entry, or other equivalent act.⁹⁷

It is not necessary for the grantor to make a demand upon the grantee that he comply with the conditions of the grant prior to the filing of a bill for relief for the violation of such conditions. A prior entry upon the premises or a demand for the possession is not necessary upon a breach of a condition subsequent before suit is brought. The grantor, upon such breach, may treat the estate as having reverted to him and sue for the recovery thereof. Such is the rule at law, and no reason is seen why the same rule should not apply in equity.⁹⁸

§ 1222. Waiver of Breach of Condition—Acquiescence in the violation of a covenant will waive its enforcement. But acquiescence cannot be inferred from delay in taking steps to prevent the violation of the covenant, because there may be no knowledge of such a covenant or of its violation. A waiver is the intended relinquishment of a known right, involving both knowledge of the existence of the right and an intention to relinquish it. Whether the right to equitable relief is affected by acquiescence depends upon the circumstances of each case, and the facts may be inquired into in order to determine the validity of such a defense.⁹⁹

97—*Mott v. Danville Seminary*, 129 Ill. 403.

98—*Lyman v. Suburban R. R. Co.*, 190 Ill. 320.

99—*Star Brewing Co. v. Primas*, 163 Ill. 652.

§ 1223. Jurisdiction of Courts of Equity to Grant Relief on Breach of Condition—The general rule that equity will not grant relief in cases in which the party has a complete remedy at law, has its exceptions in cases of concurrent jurisdiction, as in fraud and some others. The remedy at law must not only appear clear, and not doubtful or difficult, but the remedy there must be as complete and as effectual as in equity.¹

Equity has jurisdiction to grant relief on the breach of a condition subsequent, where there is no adequate remedy at law. A judgment at law for damages would not restore the grantor to the possession of the property, and such a judgment would be unavailing if the grantee were insolvent. And ejectment will not lie unless the grantor is the owner of the legal title, and is ineffectual in case the premises are an easement. An easement is incorporeal in its nature, and ejectment lies to recover things corporeal only.

Mandamus is not available to the grantor as a remedy if he seeks to recover the property, as that remedy would be to compel the grantee to perform the condition.²

Where a deed conveying the fee of the land contains a clause restricting the sale of intoxicating liquors on the land, if the same is clearly expressed in the conveyance, it will be enforced by injunction.³

Where, however, the language in the limitation or restriction is uncertain and indefinite an injunction restraining its violation will be denied.⁴

Courts of equity will not lend their aid to assist one in realizing upon an unconscionable bargain, even though the contract under which it is claimed possesses all technical requirements. If the contract is unfair, one-sided, unjust, unconscionable or affected by any other inequitable feature,

1—*Frazier v. Miller*, 16 Ill. 48;
Fabrice v. Van der Brelie, 190 Ill.
460; *Cumby v. Cumby*, 240 Ill. 235.

2—*Lyman v. Suburban R. R. Co.*,
190 Ill. 320.

3—*Guyer v. Auers*, 132 Ill. Ap. 520.

4—*Eckhart v. Irons*, 128 Ill. 568.

or its enforcement would be oppressive or hard on the defendant, or would prevent his enjoyment of his own rights or would work an injustice, or if the plaintiff had obtained it by sharp and unscrupulous practices, by overreaching, by trickery, by taking undue advantage of his position, by non-disclosure of material facts, or by any other unconscientious means, then a specific performance will be refused.⁵

§ 1224. Courts of Equity Will Interpose to Prevent the Breach of Negative Covenants—A clause in a deed, while it may not be considered a condition within the legal determination of that term, may be regarded as a negative covenant. Equity will interpose by injunction to prevent the breach of negative covenants annexed to leases or deeds. The prohibition of their breach is indirectly an enforcement of their specific performance. Equity will interfere by injunction to prevent the breach of an express negative covenant, even though no substantial injury is caused by such breach. It will also interfere, even though damages may be recovered at law. The reason is that the owner of land selling or leasing it may insist upon just such covenants as he pleases touching the use and mode of enjoying the land. He has a right to define the injury for himself, and the party contracting with him must abide by the definition.⁶

§ 1225. Change in Character and Environments of Property Subject to Conditions or Restrictions—Equity will not, as a rule, enforce a restriction, where, by the acts of the grantor, who imposed it, or of those who derive title under him, the property, and that in the vicinage, has so changed its character and environment, and in the use to which it may be put as to make it unfit or unprofitable for use, if the restriction be enforced, or where to grant the relief would

5—Koch v. Streuter, 232 Ill. 594.

6—Star Brewery Co. v. Primas,
163 Ill. 652.

be a great hardship on the owner and of no benefit to the complainant, or where the complainant has waived or abandoned the restriction, or in short, it may be said that where, from all the evidence, it appears that it would be against equity to enforce the restriction by injunction the relief will be denied, and the party seeking its enforcement will be left to whatever remedy he may have at law.⁷

§ 1226. Condition for the Support, Maintenance and Care of Grantor—It is true that ordinarily a promise to do something in the future does not constitute a fraud, and the violation or disregard of such a promise does not amount to a fraud; but a deed, the consideration of which is the support and sustenance of the grantor by the grantee, belong to a peculiar class, distinguished in the decisions of the courts from ordinary deed of bargain and sale, in the fact that the grantor gives up his property for the consideration of future support, which a court of equity cannot compel the grantee to furnish, and a court of law cannot make good with damages. If the evidence is such as to justify a conclusion that a contract of that kind was entered into with a fraudulent intent, or has been abandoned, a court of equity will set aside the conveyance. The failure on the part of the grantee to perform, must be substantial and in relation to material matters, and if the grantor prevents the grantee from carrying out the contract there can be no presumption of fraud which would justify the setting aside the deed.⁸

So where a grantor conveyed his lands to the grantee, and also all his personal property, on condition that the grantee should furnish the grantor and his wife support and maintenance during their natural lives, and the grantee wholly neglects and fails to keep and perform the condition and treats the grantor and his wife with unkindness, using violent and abusive language towards them, and inflicting

7—*Ewertsen v. Gertenberg*, 186 Ill. 344. 8—*Russell v. Robbins*, 247 Ill. 510.

blows upon them, and so rendered it impossible for them to live with the grantee, a court of equity will entertain a bill to set aside the conveyance and render a decree for damages for the personal property received and retained by the grantee.⁹

It has frequently been held in this State that where a grantor conveys lands, and the consideration is an agreement by the grantee to support, maintain and care for the grantor during the remainder of his life, and the grantee neglects and refuses to comply with the contract, the grantor may, in equity, have a decree rescinding the contract and setting aside the deed, and re-investing the grantor with the title to the real estate. A careful examination of the cases cited in support of the doctrine leads to the conclusion that the intervention of equity in such cases has been sanctioned in this State on the theory that the neglect or refusal of the grantee to comply with his contract raises the presumption that he did not intend to comply with it in the first instance and that the contract was fraudulent in its inception, wherefore, a court of equity will not permit him to enjoy the conveyance so obtained.¹⁰

But where the grantee has fully complied with his contract up to the time of his death and leaves only minor heirs, the failure of the heirs to support the grantor during his lifetime is not ground for the cancellation of the deed. There is no presumption that the grantee nor his heirs originally intended to defraud the grantor.¹¹

Where the consideration expressed in the deed is \$1,000, and the future support of the grantors during the remainder of their lives, where there was no fraud practiced upon the

9—*Frazier v. Miller*, 16 Ill. 48; *Neely*, 152 Ill. 471; *Kusch v. Kusch*, 143 Ill. 353; *Cooper v. Gunn*, 152 Ill. 471; *McClelland v. McClelland*, 176 Ill. 83; *Fabrice v. Van der Brelie*, 190 Ill. 460; *Cumby v. Cumby*, 240 Ill. 235.

10—*Stebbins v. Petty*, 209 Ill. 291, citing *Frazier v. Miller*, 16 Ill. 48; *Oard v. Oard*, 59 Ill. 46; *Jones v.*

11—*Stebbins v. Petty*, 209 Ill. 291.

grantors by the grantee in obtaining the execution of the deed, proof of the failure of the grantee to pay the \$1,000, would not be ground for avoiding or cancelling the deed.¹²

The county court is authorized to ascertain the damages growing out of the breach of contracts, and to require the same to be paid out of the estate of the party failing to perform the contract. So where the deceased agreed to support his father and mother during their lives, and died, and thereby ceased to furnish the support, his estate will be liable for damages for his failure to furnish such support.¹³

If a son contract for the support of his father during his life, such a contract requires the personal services, attention and care of the son, such as may be demanded by age, infirmity or sickness, and a court of equity, after the death of the son, is powerless to compel a specific performance of such a contract by the personal representatives or devisees of the son.¹⁴

Where the deed, the consideration for which is an agreement on the part of the grantee to support the grantor during his natural life, reserves a lien on the land to secure the performance of the agreement, the grantor may file a bill to enforce the lien even against the minor of the grantee, who had during his lifetime performed his part of the agreement.¹⁵

In determining whether proper support has been furnished, under a contract to do so, the condition in life of the parties at the time the contract was made, must be taken into consideration. Where all the parties are poor, and the complainant is not only unable to take care of herself, but has no property which would furnish her with a support, and the defendant was of the working class, it

12—*Calkins v. Calkins*, 220 Ill. 111; *Rendleman v. Rendleman*, 156 Ill. 568.

13—*Campbell v. Potter*, 147 Ill. 576; *Calkins v. Calkins*, 220 Ill. 111.

14—*Campbell v. Potter*, 147 Ill. 576; *Calkins v. Calkins*, 220 Ill. 111; *Stebbins v. Petty*, 209 Ill. 291; *Seymour v. Belding*, 83 Ill. 222.

15—*Stebbins v. Petty*, 209 Ill. 291.

is not to be supposed that either party anticipated that the support to be furnished would be different from or better than that pertaining to their station in life.¹⁶

Where a son for a valuable consideration enters into a contract with his father to pay him a certain sum of money annually during his life, and such further sum as his wants and comfort may require, provided the total amount to be paid does not exceed a certain sum, after the death of the father the son is not liable for the balance between the sum actually paid and the gross sum limited by the proviso.¹⁷

§ 1227. Restrictions on Use of Property Not Favored—

If is often a matter of difficulty to determine whether a certain provision annexed to a grant of real property is such a condition as that a breach of it confers the right of re-entry on the grantor or his heirs, or whether such a provision is a covenant, restriction, limitation or trust imposed upon the property, affecting the estate in a different way from that in which a true condition affects it.

Conditions annexed to an estate are sometimes so placed and confounded amongst covenants, sometimes so ambiguously drawn, and at all times have in their drawing so much affinity with limitations, that it is hard to discern and distinguish them. Time has not removed or much lessened these difficulties. Indeed, the change in the meaning of technical words wrought by modern construction, the more varied uses to which land may be put, and the ever-increasing number of expressions employed to make contracts conform to our complexed commercial situation, have tended rather to increase the difficulties.¹⁸

Where real property is conveyed in fee, restrictions on its use are not favored, but where the intention of the parties is clear in the creation of the restriction or limitation upon the use by the grantee, courts will enforce the same.

If, however, there is any doubt whether the restriction

16—*Russell v. Robbins*, 247 Ill. 510.

18—*Koch v. Streuter*, 232 Ill. 594.

17—*Fort v. Richey*, 128 Ill. 502.

was to be permanent, the existence of the doubt is to deny the existence of the restriction or limitation. All doubts must be resolved in favor of the natural rights, and against restrictions thereon. In this country real estate is an article of commerce, the uses to which it should be devoted are constantly changing as the business of the country increases, and as its new wants are developed; hence, it is contrary to the well recognized business policy of the country to tie up real estate where the fee is conveyed, with restrictions and prohibitions as to its use, and hence, in the construction of deeds containing restrictions and prohibitions as to the use of the property by a grantee, all doubts should, as a general rule, be resolved in favor of the free use of property, and against restrictions.¹⁹

The plat to a subdivision of a block of land showed a dotted line across the ends of the lots twenty feet from the street which was marked, "line of front of buildings." The deeds of the lots by the proprietor granted the lots by their numbers on the plat, and contained after the granting clause the words "together with the exclusive use of the court yard between the lots and the street upon condition that such yards shall only be used as a front door yard, and that the said party of the second part shall put no building upon the said yard, except front doorsteps, nor erect any fence of unusual height, which shall obstruct the view of the neighborhood." It was held that the restriction in the deed in the use of the said twenty feet was intended for the benefit of the owners of the other lots in the block fronting on the same street, and to the extent of such restriction it created an implied equitable servitude in favor of the other lot owners. In such case, each purchaser took the estate burdened with a like servitude in favor of the other lots, and an equitable easement attached

¹⁹—Eckhart v. Irons, 128 Ill. 568;
Hutchinson v. Ulrich, 145 Ill. 336;
Ewertsen v. Gerstenberg, 186 Ill. 344.

to each and every lot so conveyed. The equitable easement and burdens attached to each lot were mutual and reciprocal, and each lot owner was subject to the equitable burden and entitled to enjoy the same easement. There was no clause of forfeiture in the deeds for the breach of the condition and therefore the estate was not one upon condition, but that the estate vested in the grantee to the whole lot, and the clause in the deed was simply a limitation. The clause did not create an exception, for the reason that an exception withdraws from the effect of the grant some part of the thing granted, and which otherwise would be included in the grant. Nor can the clause be strictly considered as a reservation, for the reservation must be to the grantor, or the one creating the estate, and must be of something arising out of the thing granted, as an easement or the like.²⁰

§ 1228. Waste—Introduction—After a diligent search of the reports the author has been unable to find a single case where an estate has been forfeited in Illinois for the commission of waste. This is doubtless due to the fact that forfeitures are abhorred both at law and in equity, and also from the fact that a more adequate and complete remedy is afforded by courts of equity by way of injunction to prevent the commission of waste, and an accounting therefor.

But by the common law and the old English statutes the forfeiture of an estate for waste was authorized, and it does not follow that because it has not been enforced in Illinois, it will not be when a proper case arises.

The subject of waste is a very important one in our jurisdiction, and here seems to be a proper place to consider it. In doing so attention will be given to the jurisdiction of courts of equity, and the method of procedure.

§ 1229. Waste Defined—Waste is a spoil or destruction in houses, gardens, trees or other corporeal hereditaments, to

20—Eckhart v. Irons, 128 Ill. 568.

the disherison of him that hath the remainder or reversion in fee simple or fee tail.²¹

To convert land from one species to another is waste. To convert wood, meadow, or pasture into arable; to turn arable, meadow or pasture into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste.

The rule is, that whatever does lasting damage to the freehold, or tends to the permanent loss to the owner of the fee or destroys or lessens the value of the inheritance, is deemed waste, and this rule has been kept steadily in view and recognized as correct in all cases relied upon in support of the more liberal American rule.²²

§ 1230. **Kinds of Waste**—Permissive waste consists in the mere neglect or omission to do what will prevent injury, as, to suffer a house to go to decay for want of repairs; and voluntary waste consists in the commission of some destructive act, as, pulling down a house or plowing up a flower garden.²³

Anything is waste which changes the character of the inheritance; hence, even acts which increase the pecuniary value of an estate may amount to waste; such waste is called *meliorating waste*.²⁴

§ 1231. **Equitable Waste**—There has been, however, grafted into equity a form of waste not recognized at the common law, which is termed “equitable waste,” and of which courts of chancery take cognizance, and under the theory of which they grant relief to the holders of contingent and executory estates. “Equitable waste” may be defined to be such acts as at the law would not be esteemed to be waste under the circumstances of the case, but which in the view of a court of equity are so esteemed from their manifest injury to the inheritance, although they are not

21—*Minneapolis T. Co. v. Verhulst*, 74 Ill. Ap. 351; 2 Black. Com., 281,

22—*Stewart v. Wood*, 48 Ill. Ap. 378.

23—*Consolidated Coal Co. v. Savitz*, 57 Ill. Ap. 659.

24—*Palmer v. Young*, 108 Ill. Ap. 252; 2 Black. Com., 282.

inconsistent with the legal rights of the party committing them. Instances of this class of interference are where the mortgagor fells timber on the mortgaged premises to the extent that the security becomes insufficient; and where a tenant for life, without impeachment for waste, pulls down houses or does other waste wantonly and maliciously; for it is said, a court of equity ought to moderate the exercise of such power, *pro bono publico* restrain extravagant, humerous waste. In all such cases the party is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interest of others. The definition above given is accepted by most of the text writers and quoted with approval by the courts. It will be observed that no certain *criteria* are set forth in the definition by which courts may determine when the rule of equitable waste applies, but it is said that extravagant and humerous waste will be enjoined *pro bono publico*, and in that class of cases where the writ is allowed the party will be deemed guilty of a wanton and unconscientious abuse of his rights. And equitable waste has been defined to be "that which a prudent man would not do to his own property." And it is said that the latter statement of the rule is the most comprehensive the court has been able to find, and seems to be a safe guide in the considerations of the court. And while the court was not prepared to say that a court of chancery will in no case restrain waste by the holder of a base fee, yet it did hold that it should only interfere in those cases where it is made to appear that the contingency which will determine the fee is reasonably certain to happen, and the waste is of a character that it may be said that the party charged is guilty of a wanton and unconscientious abuse of his rights. So long as the estate in fee remains, the owner in possession has all the rights in respect to it which he would have if tenant in fee simple, unless it is so limited that there is a probable reversionary right in another,

—something more than a possibility of reverter, belonging to a third person.²⁵

§ 1232. **Acts Constituting Waste**—The removal of a building, or any improvement permanently attached to the freehold, is per se an injury to the freehold and such removal will be regarded as waste.²⁶

The opening of coal mines by a life tenant amounts to waste, and the same rule applies to oil well. Oil is a mineral, in such cases, and a part of the realty. A tenant for life would have no right to operate for an oil well on the land, and neither would his trustee for his benefit. The taking out of the oil would be waste, which a court of equity would enjoin.²⁷

A tenant waives his right to remove trade fixtures, where, at the expiration of the lease under which they were erected, he takes a new lease which neither reserves the right to the fixtures, nor recognizes his right to remove them under his former lease, but covenants that he will keep the premises in good repair and deliver them up in good condition as when received and the removal of them by the tenant will be enjoined as waste.²⁸

In a life estate in lands the right to take and cut timber is restricted to three purposes: (1) Such as is necessary for the improvements on the premises in ordinary repairs; (2) a sufficient amount for ordinary firewood for the tenants thereon; (3) such timber as is going to waste or decay. So it was held that a life tenant had no right to sell timber to be taken from the estate.²⁹

His right is, that of reasonable estovers, which is confined strictly to wood and timber for the supply of the estate, and it must be actually applied, used and consumed upon

25—Gannon v. Peterson, 193 Ill. 361; Priddy v. Griffith, 150 Ill. 372. 560.

26—Davis v. Carsley M. Co., 112 Ill. 28—Davis v. Carsley M. Co., 112 Ill. Ap. 112; Williams v. Chicago Ex. Co., 188 Ill. 19. Ap. 112.

27—Ohio Oil Co. v. Daughetee, 240 29—Stewart v. Wood, 48 Ill. Ap. 378.

the estate, for the purposes of its proper use, occupation and enjoyment. It was therefore held that a tenant by the courtesy who had cut and sold timber from the estate was liable to account therefore to the owner of the fee, and be enjoined from further committing waste.³⁰

In England good husbandry required the preservation of growing trees, and it was considered waste to cut them or permit them to be cut. But many acts which would be waste in England are not so here, in consequence of the different conditions of the two countries. In this country, whether the cutting of any kind of tree is waste depends upon the question whether the act is such as a prudent farmer, would do, having regard to the land as an inheritance, and whether the doing of it would diminish the value of the estate. So where it was shown that the trees cut were of no great value and that the cutting of them did not diminish the value of the estate it was held that the party a guardian, could not be held to an account for waste.³¹

§ 1233. Persons Liable for Waste—At common law the only parties liable for waste were the tenants of the legal estate, that is estates which were created by act of law as distinguished from those created by act of party, and which were termed conventional estates.

At common law when a limited estate was created by deed, the particular tenant was not liable for waste, unless it was so expressly stipulated; because the law would not protect the parties who did not care to protect themselves.

But the liability for waste was afterwards extended to conventional tenants for life or years by statute.

Waste can only be committed by one in the rightful possession of the land. That which is waste by such person, if done by a mere intruder or trespasser, would ordinarily be merely trespass.³²

30—*Armstrong v. Wilson*, 60 Ill. 226.

32—*Palmer v. Young*, 108 Ill. Ap. 252.

31—*Bond v. Lockwood*, 33 Ill. 212.

In general a tenant is answerable for waste, although it may be committed by a stranger; for he is the custodian of the property, and must take his remedy over. It is thus shown that the destructive act of a stranger constitutes voluntary waste, for which the tenant is answerable.

It is competent, however, for lessors, if they see fit, to grant leases exempting tenants from the responsibility for waste, or as it is commonly expressed, "without impeachment for waste." But unless a clause of this kind is inserted in the lease, tenants for life or for years are responsible for waste done or committed upon the premises demised.³³

§ 1234. Parties Seized of Base Fees Generally Not Liable for Waste—The authorities are uniform as to the definition, duration and extent of a base or determinable fee. They agreed that it is a fee simple estate—not absolute, but contingent, and within the general acceptation and meaning of the term the person seized of such an estate is not chargeable with waste.³⁴

It is a well settled rule of law, that a dowress is not permitted to commit waste, and that the opening of a coal mine on the premises amounts to waste; but it is equally well settled that where mines are already opened on the land which has been assigned as dower, the widow has the right to operate the mines and receive the proceeds of such operation. It is not waste for her to work the mines already opened, though the same has been abandoned prior to the death of her husband.³⁵

Where a tenant for life holds an estate "without impeachment of waste," he has greater rights than an ordinary tenant. He may cut timber of natural growth and remove it, and in fact do all things consistent with the preservation

³³—*Consolidated Coal Co. v. Savitz*,
57 Ill. Ap. 659.

³⁵—*Priddy v. Griffith*, 150 Ill. 560.

³⁴—*Gannon v. Peterson*, 193 Ill.
372.

of the estate. He cannot, of course, burn down necessary buildings, or destroy productive orchards or things of that kind, for such acts would be wanton and malicious. But he may act with reference to the estate that the owner of the fee might do, being restrained only from the commission of wilful and malicious waste. He may thin out the timber in a wood pasture, or cut all the timber and cultivate it as a field. If the cutting of the timber is not wanton or malicious, and does not amount to equitable waste it cannot be restrained by the owner of the fee, even if he sells the timber.³⁶

§ 1235. Rights of Mortgagor and Mortgagee—The mortgagor may exercise the rights of an owner, while in possession, provided he does nothing to impair the security; but a court of chancery will always, on application of the mortgagee, and with the object in view, stay the commission of waste by process of injunction. An action at law by the mortgagee will not lie for the commission of waste, because he has only a contingent interest.³⁷

A mortgagor has the right to use the premises, but he has no right whatever to commit waste or remove buildings, or do any other act which will impair the security of the mortgagee, and if he attempts to remove the building a court of equity will enjoin him from so doing. And after the building has been severed from the land, and before being attached to other land, the mortgagee may replevy the building.³⁸

A mortgagee may maintain an action for an injunction against the mortgagor or his assigns, restraining him or them from removing buildings or fixtures attached to the freehold, for the reason that so doing is waste and an impairment of the security of the mortgagee. But it would seem to be necessary for the mortgagee to allege and prove

36—Chapman v. Epperson C. H. Co.,
101 Ill. Ap. 161.

37—Minneapolis T. Co. v. Verhulst,

74 Ill. Ap. 351; Williams v. Chi-
cago Ex. Co., 188 Ill. 19.

38—Dorr v. Dedderar, 88 Ill. 107.

that such removal would render the security inadequate and insufficient.³⁹

§ 1236. Punishment for Waste—By the common law the punishment for waste was confined to three classes of persons, viz: guardians in chivalry, tenants in dower and tenants by the curtesy, and not to tenants for life or years. But by the statute of Marlbridge, 52 Henry III, and of Glauster, 6 Edw. I (both of which were in force “prior to the fourth year of James the first,” and were “of a general nature and not local to that kingdom”—Ch. 28, R. S.), it was provided that the writ of waste should not only lie against tenants by the law of England (or curtesy) and those in dower, but against any farmer or other that holds in any manner for life or years; and the statute of Glauster provided that the tenants in case of waste should “forfeit the thing which he has wasted,” and this was construed to be the premises. The penalty before this statute was single damages except in the case of a guardian, who also forfeited his wardship, by the provisions of the great charter.⁴⁰

§ 1237. Jurisdiction of Courts of Equity to Restrain Waste—The common law remedies for waste were insufficient, for among other reasons, they did not stop the injury that was going on; hence, courts of equity interposed by injunction to restrain the defendant from continuing to commit waste; and this remedy has been found so simple and so effective that it has to a great extent superseded the common law action.

The interference of courts of equity to enjoin waste was originally confined to cases founded in privity of title, but at present the courts have enlarged the jurisdiction so as to reach cases of adverse claims and rights not founded in privity even in instances of cases of trespass attended with irreparable mischief. The relief obtainable at equity has been extended to cases wherein the titles of the parties are

³⁹—*Williams v. Chicago Ex. Co.*, 188 Ill. 19. ⁴⁰—2 Black. Com., 282-3.

purely of an equitable nature and to restrain waste by persons having limited interests in property, on the mere ground of the common law rights of the parties and the difficulty of obtaining immediate preservation of the property from destruction or irreparable injury by the course of the common law. There are many cases where a person is not punishable at law for committing waste, and yet a court of equity will enjoin him at the instance of a party who could not maintain an action at law against him for waste; as where there is a tenant for life, remainder in fee, the tenant for life will be restrained, by injunction, from committing waste, although if he did so no action of waste would lie against him by the remainderman for life, for he has no inheritance; nor would an action for waste lie by the remainderman in fee, by reason of the interposed remainder for life.

For waste the remedy by injunction is fully established, and has not only virtually superseded the common law action of waste, but has to a great extent taken the place of the action on the case for damages.

In modern equity practice an injunction to restrain waste will be granted in many instances where no legal action could be maintained, though the interest of the injured party is legal, and also where the estate of the injured party is entirely equitable. An injunction may also be granted to restrain threatened waste although none has been committed.

It was anciently held that a court of equity would not restrain waste except upon unquestionable evidence of the plaintiff's title. The more modern and common practice is, in cases where irreparable mischief is being done or threatened, going to the substance of an estate, to issue an injunction though the title to the premises is in litigation.

An injunction to restrain waste may be granted in other cases besides those of particular tenants and remaindermen. At common law an action of waste would not lie by a re-

mainderman against a tenant for life, if there was a mesne remainderman; but in equity the ultimate remainderman was allowed to maintain a bill for an injunction.⁴¹

Where a court of equity entertains a bill to restrain the committing of waste, it should also proceed for an accounting for waste already committed in order to prevent a double suit.

In the State of Illinois it is not necessary to the issuing of an injunction restraining waste that the party in possession should be shown to be insolvent.⁴²

An action at law for waste committed can only be maintained by a reversioner or by the heirs who hold the fee. However, an executor, who is vested with power to make leases, may maintain such an action where the leasee has covenanted in his lease not to commit waste. The action should be in covenant.⁴³

41—Palmer v. Young, 108 Ill. Ap. 252.

42—Palmer v. Young, 108 Ill. Ap. 252.

43—Page v. Davidson, 22 Ill. 111.

CHAPTER XIV

CONVEYANCES—TITLE BY ALIENATION

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- § 1397. Deed Will Convey Whatever Interest Grantor Has in the Lands.
- § 1398. Merger of Titles.
- § 1399. Mergers Not Favored in Law or Equity.
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- § 1436. Grant to Several; Remainder to Heirs of One.
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- § 1439. Origin of Rule in Shelley's Case.
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- § 1442. Distinction Drawn Between Deeds and Wills in the Application of the Rule in Shelley's Case.
- § 1443. Words of Limitation and Words of Purchase.
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- § 1446. Fee Tail Changed to Life Estate—Remainder in Fee to Successor.
- § 1447. Estates in Tail at Common Law Defined.
- § 1448. Origin and Creation of Estates Tail.
- § 1449. Statute Regarding Fees Tail Strictly Construed.
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- § 1451. Statutory Form of Conveyances.
- § 1452. Statutory Form of Warranty Deed—Statute.
- § 1453. Effect of Statutory Form—Statute.
- § 1454. Section 9 of the Statute on Conveyances to Be Read in Connection with Section 13 of the Statute.
- § 1455. Pleadings and Practice on Breach of Covenant in Statutory Deed.
- § 1456. Measure of Damages on Breach or Warranty in Statutory Deed.
- § 1457. Statutory Form of Quit Claim Deed—Statute.
- § 1458. Effect of Statutory Form of Quit Claim Deed.
- § 1459. Quit Claim Deed as a Deed of Release.
- § 1460. Statutory Form of Mortgage—Statute.
- § 1461. Effect of Statutory Mortgage—Statute.
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- § 1462. Deeds of Counties—Statute.
- § 1463. Conveyances by Plats and Subdivisions.
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- § 1466. Liability of Heir or Devisee at Common Law.
- § 1467. Statutory Liability of Heir or Devisee a Cumulative Remedy.
- § 1468. Pleadings Against Heirs.
- § 1469. Knowledge of Contents of Instruments—Blind and Illiterate Persons.
- § 1470. Construction of Conveyances.
- § 1471. Intention of Parties to Be Ascertained and to Control.
- § 1472. Ambiguous Instruments Construed Most Strongly Against the Grantor.
- § 1473. Punctuation Not Regarded in Construing Instruments.
- § 1474. Presumption Where Father and Son Have the Same Name.
- § 1475. Rights of Grantee Limited to Estate Granted.
- § 1476. Latitude Allowed in the Construction of Wills.
- § 1477. Conveyances Testamentary in Character.
- § 1478. Conveyances Not Testamentary in Character.
- § 1479. Power of Revocation in Deed.
- § 1480. Titles Affected by Estoppel Introduction.
- § 1481. Estoppels Defined.
- § 1482. Equitable Estoppels.
- § 1483. Origin of Equitable Estoppels.
- § 1484. Estoppels in Their Nature of Three Kinds.
- § 1485. Estoppels in Pais.
- § 1486. Estoppels Applicable to Municipalities.
- § 1487. Liens on Lands.
- § 1488. Judgment Liens.
- § 1489. Judgments on Constructive Notice.
- § 1490. Liens of Creditor's Bills.
- § 1491. Priority of Liens on Lands of Debtor Fraudulently Conveyed.
- § 1492. Lands Subject to Judgment Liens.
- § 1493. Remedy of Creditor Where Debtor Has Fraudulently Conveyed Land Prior to Judgment.

- § 1494. Purchaser at Judicial Sale Not Entitled to Possession Till Deed Is Delivered.
- § 1495. Vendor's Lien.
- § 1496. Alteration of Deeds.
- § 1497. Courts of Equity May Reform Conveyances and Correct Mistakes Therein.
- § 1498. Courts of Equity Will Correct the Omission by Mistake of a Seal.
- § 1499. Power of Courts of Equity to Set Aside Conveyances.
- § 1500. Party Asking Equity Must Do Equity.

§ 1245. **Introduction**—The most usual and universal method of acquiring or losing title to real estate is that of alienation, conveyance or purchase in its legal sense; under which may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another; whether that be effected by sale, gift, marriages, settlement, devise, or other transmission of property by mutual consent of the parties.¹

Anciently, land could not be sold by persons claiming its ownership; nor could he mortgage it for any purpose; nor could it be subject to sale on execution; but as commerce advanced, and the business and wants of trade increased, in various modes, and by slight changes by legislation, these shackles were removed, and lands naturally, but at no remote period, became an article of commerce, and subject, like personalty, to the requirements of trade. The policy of restraining its alienation has given place to the demands of the times, and its acquisition is free to all who desire its ownership.²

In pursuing the inquiry in regard to the transfer of title to real estate, the inquiry will be (1) who may alien; (2) to whom it may be aliened; (3) how it may aliened; and (4) what may be aliened.

(1) All persons owning real estate may alienate the same, except idiots and persons of unsound memory, in-

1—2 Black. Com. 286.

2—Cottingham v. Springer, 88 Ill.

fants and persons under duress; and these are not totally disabled either to convey or purchase real estate, but sub modo only. Their conveyances and purchases are not absolutely void but voidable only. But all such persons are under the protection of the law, which will not suffer them to be imposed upon, through the inability of their present condition to enter into contracts; but their acts are binding, in case they are afterwards ratified or agreed to, when such inability ceases.

(2) There are very few restrictions as to whom alienation may be made under our laws; an alienation is good to any person, except to persons laboring under disabilities, aliens and corporations, and as to them such alienations are good under certain restrictions and conditions.

(3) The methods by which real estate could be alienated were numerous under the laws of England, but with us there are only two, viz.: by deed and devise contained in a last will or testament.

The various features of such alienation will be considered in their appropriate places.

(4) There are very few species of real estate which are not capable of being conveyed, and there are some species which can only be conveyed by deed. This subject will be more fully considered in the section in regard to the component parts of a deed in which the premises are considered.

§ 1246. Purchase Defined—There are some matters which should be considered before entering upon the subject of the elements of a conveyance, such as the word “Purchase” and “Livery of seizin.” The word “purchase” taken in its largest and most extensive sense, is the possession of lands and tenements, which a man has by his own act or agreement, and not from descent from his ancestor or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every method of acquiring an estate, other than merely by inheritance, where-

by a title vested in a person, not by his own act or agreement, but by the single act or operation of law.³

§ 1247. Power of the Legislature to Transfer Title—It may be remarked at the outset that the legislature has no power to transfer one man's property to another. If a man is the owner of property, the legislature has no power to say that acts already performed by another party, which were nugatory, without any other act being done by either party shall operate to transfer the title to the property from one to the other.⁴

The same construction was given to the act of 1822, such acts have no retroactive effect.⁵

§ 1248. Livery of Seizin Unnecessary—Conveyance Under Seal—Statute—"That livery of seizin shall in no case be necessary for the conveyance of real property; but every deed, mortgage or other conveyance in writing, not procured by duress, and signed and sealed by the party making the same, the maker or makers being of full age, sound mind, and discreet, shall be sufficient, without livery of seizin, for giving, granting, selling, mortgaging, leasing or otherwise conveying or transferring any lands, tenements or hereditaments in this State, so as, to all intents and purposes, absolutely and fully to vest in every donee, grantee, bargainee, mortgagee, lessee, or purchaser, all such estate or estates as shall be specified in any such deed, mortgage, lease or other conveyance. Nothing herein contained shall be construed as to divest or defeat the older or better estate or right of any person or persons, not party to any such deed, mortgage, lease, or other conveyance."⁶

At common law, livery of seizin was indispensable to the complete investiture of title. To render livery of seizin available it was necessary that the grantor should be in possession of the premises. It was also a rule of the com-

3—2 Black. Com. 241.

5—Noakes v. Martin, 15 Ill. 118.

4—Deining v. McConnel, 41 Ill.

6—Sec. I, Ch. 30, R. S.

mon law, that all conveyances of real estate, in adverse possession were void, because the grantor being out of possession, was unable to invest the grantee with possession, and also for the reason that the grantor was held to have only a right of action, which was not assignable at common law.⁷

In this State, by the act of 1827, which is almost identical with section one of the present Conveyance Act, abolished livery of seizin. Our modern tenures are happily freed from the ancient restraints, and the necessities of society relieved from useless forms and unmeaning ceremonies, until what was a most intricate and highly technical system has become comparatively simple. Hence, under this statute, a deed in the form of bargain and sale must be regarded as having the force and effect of a feoffment.⁸

§ 1249. Seizin Defined and Explained—The feudal idea in regard to real estate is so inwrought into the whole theory of the law on that subject, and especially in acquiring and transferring titles thereto, that it is difficult to understand and apply the language of our own courts upon the subject, without some knowledge of what the early law was on this subject.

Under the common law the word seizin had a technical, complex meaning, and being, in the sense of the law, the complete feudal investiture by which the tenant was admitted into the feud and performed the rights of homage and fealty. To render livery of seizin availing it was necessary for the grantor to be in the possession of the property.

Livery of seizin was performed by the lord, or some one representing him, going on the land with the tenant, and giving him actual possession, by putting into his hands, some part of the premises, like a terf or a twig, in the presence of the *pares curiae*, i. e., the peers of the lord's

7—Shortall v. Hinckley, 31 Ill. 219. 138; Witham v. Brooner, 63 Ill. 344;

8—Vinson v. Vinson, 4 Ill. App. Shackelton v. Seabee, 86 Ill. 616.

court—who were tenants and vassals of the lord, as witnesses to the act.

Seizin as now understood, is either in fact or in law: Seizin in fact has been above described. The other occurs, for example, when an ancestor or deviser dies leaving his lands vacant, the heir in the one case and the devisee in the other, are deemed by law, to have a seizin, in law, which may, at any time, be converted into a seizin in fact.

To constitute a seizin in fact, there must be an actual possession of the land; for a seizin in law, there must be a right to immediate possession, according to the nature of the interest, whether corporeal or incorporeal.⁹

§ 1250. Commencement of Fee Simple Title in the Future—Under the feudal law livery of seizin and the investiture of title were one and the same act, so under that law there could not be an investiture of title at one time and livery of seizin at another, and thus arose the common law principle that a fee simple title could not be created to commence in the future. But since livery of seizin no longer is necessary to a valid conveyance, an estate in fee simple may be conveyed to commence in the future, without the creation of an intermediate estate to support it. Under the well settled law of this State, such a deed, if executed and delivered, is a valid conveyance.¹⁰

By the act of 1827 it was provided, in substance, that every deed or other conveyance or transfer of land, should be sufficient without livery of seizin, so as to absolutely and fully vest in every donee, grantee, bargainee, or purchaser of such estate as should be specified in the deed or other conveyance.¹

§ 1251. Kinds, Forms and Character of Deeds—The law recognizes two kinds of deeds, to wit: deeds poll and in-

9—I Wash. on Real Property 35,
2 Black. Com. 311; Shortall v. Hinck-
ley, 31 Ill. 219.

10—White v. Willard, 232 Ill. 464.

1—Latimer v. Latimer, 174 Ill. 418.

dentures; the distinction is now far less important at the present time than it was formerly.

A deed poll is one in which the party making it only executes it, or binds himself by it as a deed, though the grantors and grantees therein may be several in number, the ordinary purpose of a deed poll being to transfer the right of the grantor to the grantee.

Deeds poll may, generally, be said to include every kind of deed which is not an indenture. They are usually in form, in the first person, but they are equally good though made in the third person.

The word indenture was taken from the fact that anciently the edges of the deed were indented, something like the teeth of a saw. It was considered necessary, in order to prevent fraud, that the two parts of a mutual agreement, should be written on the same piece of paper and then cut them apart in an irregular line so that the edge of one would fit into the edge of the other, *instar dentium*, and thus establish the authenticity of the several parts. So that now the word indenture is used to describe a deed to which two or more persons are parties, and in which these enter reciprocal and corresponding grants or obligations toward each other. Indentures are bipartite, tripartite, and the like, according to the number of parties of which they consist, each of which would have a complete effect as the whole together. This form of deed began to be used in the time of John and Henry II, and has been used ever since that period. Formerly it was usual for each party to sign but one of the parts, in which case the part which was executed by the grantor was called the original, and the other the counterpart. Lately it has become common for each party to execute all the parts, and thereby all become original.

And an indenture may be made in the first or third person, though most commonly the latter form is adopted. But though a deed be called an indenture, and be so in form,

except in requiring something from both parties named, yet if it is prepared and intended for the grantor only to execute it, and he does so, it will be a valid deed as to him, and convey whatever interest he has to the grantee.²

The names of the forms of conveyances which take their rise from the construction of the Statute of Uses are, "Bargain and Sale," "Covenant to Stand Seized" and "Lease and Release." All these dispensed with the necessity of an actual seizin, and while they recognized a seizin as essential to give effect to the conveyance, the statute transferred this, and executed the use by uniting the legal seizin with the equitable use, thereby creating an entire legal estate of the two.

In deeds of bargain and sale the consideration is required to be money, or something representing money. The principle feature in a deed of bargain and sale is the use of the words "grant, bargain and sell," in the granting clause of the deed, and the effect of these words will be more fully considered hereafter.

In Covenants to stand seized the consideration consisted of relationship by consanguinity or affinity, though this distinction seems sometimes to have been lost sight of by the courts.

On leases and releases the transfer of the seizin and estate from the grantor to the grantee was by bargain and sale for a year for a valuable consideration whereby a use for a time was raised in the bargainee and the statute passed to him the legal possession of the land and then by a release from the owner of the reversion dispensed with the formality of livery of seizin.

Both the lease and release were known to the common law, but the latter, to become operative, had to be made to one having an estate in possession of the land, while a lease before entry under it, created no estate in the lessee, but a mere *interesse termini*, as it was called. So that this

2—2 Wash. on Real Prop. 587-9.

mode of conveyance derived its vital energy and effect from the possession which the law, under the statute of uses gave to the lessee or bargainee for the year, thereby rendering him capable of acquiring the inheritance by a simple deed of release. The necessity of a formal lease, however, was removed in England by statute in 1841.³

The usual form of deed used in this State is that of bargain and sale, although there are instances where the other forms have been used.

Deeds are also known by the name of Warranty Deed and Quit Claim Deed. A warranty deed is one which contains a warranty of title on the part of the grantor to the grantee, which runs with the land to those who succeed the grantee in his title. A quit claim deed is in the nature of a release containing the words of grant as well as release, and has long been used in this country and has been regarded as a mode of practically conveying an independent title to real property. Our statute prescribes a form of both warranty and quit claim deeds which will be considered in their proper place herein.

§ 1252. Component Parts of a Conveyance—A conveyance properly drafted is composed of several parts: 1, The premises; 2, The habendum and reddendum; 3, Such covenants as the parties desire to be inserted, and, 4, The attestation clause with signature and seal. These various constituent parts are also subdivided, which will receive proper attention as progress is made.

§ 1253. The Premises in a Conveyance—This part of a conveyance usually embraces all that precedes the habendum, including the parties, the consideration, whatever recitals it may be proper to insert by way of explanation, the description of the property granted, with such exceptions out of the same as the parties intend to make. Besides these, not only the words of grant, but usually the

3—2 Wash. on Real Prop. 605.

2 R. P.—7

estate or quantity of ownership, are also mentioned in connection with the grant.⁴

There is usually a date inserted in a deed, as indicating the time when it was executed and delivered. But it is not material that a date should be inserted in a deed nor would it affect the deed if the date was an impossible one, as the 30th day of February. In indentures the date is commonly inserted at the beginning of the instrument, but in single deeds, or deed poll it is generally inserted at the close.⁵

§ 1254. Essentials of a Good Legal Conveyance—It may be remarked that the essentials of a good legal conveyance are: (1) A maker or grantor, capable of conveying; (2) A grantee capable of taking or receiving; (3) A good and sufficient consideration; (4) A proper description of something capable of being conveyed; (5) It must be in writing, and signed and sealed by the maker; (6) It must be delivered by the maker; (7) And accepted by the grantee. Let us consider these subjects in their order.

§ 1255. Right of Grantor to Convey—The property owner, unless an idiot or lunatic, must be allowed to make his own division and disposition of his property. And the fact that a party is physically unable to look after his property, or that his mind is enfeebled by age or disease, if not to the point of lunacy or imbecility, does not take from him that power.⁷

§ 1256. Identity of Grantor—While it is true that there must be certainty as to the grantor, yet where one of the grantors is described in the deed as Robert P. McCormick, and the deed is executed by R. Parker McCormick, and the certificate of acknowledgment shows that it was acknowl-

4—2 Wash. on Real Property 612.

5—2 Wash. on Real Prop. 577.

7—Kinball v. Cuddy, 117 Ill. 213;

Willemin v. Dunn, 93 Ill. 511; Wiley v. Ewalt, 66 Ill. 26.

edged by Robert P. McCormick, this will be sufficient to show that Robert P. McCormick and R. Parker McCormick were one and the same persons.⁸

§ 1257. **Idem Sonans**—It not infrequently happens that the names of parties are spelled differently in different deeds; that is, land may be conveyed to a grantee whose name is spelled one way and in his deed as grantor his name is spelled another way; this is immaterial if the two names sound the same. To illustrate: A deed was made to Mitchell Allen, and it was claimed that he made a deed by the name of Michael Allaine. A deed was also made to Otaine Allaine, and a deed was shown from Antoine Allain. It was held that the various names were French names and idem sonans.⁹

§ 1258. **Mental Capacity of Grantor to Convey**—Proof of mental capacity to make a deed differs somewhat from proof of mental capacity to make a will. In the case of a will, proof that the testator has sufficient mind and memory to enable him to know and understand the transaction he is engaged in when he was making the will is the test of mental capacity, and not whether he had sufficient mind and memory to transact ordinary business. As a sale of property becomes effective during the life of the vendor and the right of enjoyment and possession passes from him, it becomes important to him to understand and comprehend the value of what he is parting with and what he is receiving in return for it, and to that end he must have mental capacity to form and exercise some judgment as to whether he will be benefited or injured by the transaction. That he has such capacity is shown by proof that he is capable of transacting ordinary business affairs wherein his interest is involved. If he is lacking in that degree of comprehension, it may well be regarded that he is incapable

⁸—Grand Tower M. M. & T. Co. v. Gill, 111 Ill. 541.

⁹—Chiniquy v. Catholic Bishop of Chicago, 41 Ill. 148.

of understanding the nature and effect of the act in disposing of his land to another.¹⁰

A decree setting aside a deed will be sustained where the evidence shows that the complainant was an old woman and of feeble health, and was induced to make a transfer of her property which was of considerable value and unincumbered for other property heavily incumbered and which was represented to her as unincumbered; that she was a German woman, unacquainted with the English language, and relied upon the representations made to her by the agent who negotiated the transaction.¹¹

The law presumes every man to be sane until insanity is proven, the burden of proving which is upon the party alleging it.

When, however, insanity or lunacy is once established to have existed, the presumption of its continuance arises until rebutted by proof, the burden of which lies upon the party alleging a restoration or lucid interval.¹²

The mental capacity, which is required to make a deed or contract valid, is that which exists at the time of the execution of the deed or contract. At that time the grantor in a deed, or the maker of a contract, must know and comprehend the transaction in which he is engaged. If he does not know or comprehend the transaction, then it is invalid.

It is true that old age and loss of memory do not, necessarily and of themselves, indicate a want of capacity to make a conveyance or contract. But where a person feebled in mind by disease and old age is so placed as to be likely to be subject to the influence of another, and makes a voluntary disposition of property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act, and that it was done through no influence of the donee. If this is not shown by the proofs

10—Beaty v. Hood, 229 Ill. 562;
Ring v. Lawless, 190 Ill. 520.

12—Menkins v. Lightner, 18 Ill.
282.

11—Shea v. Teufert, 207 Ill. 222.

the transaction is presumptively void. The donee must show good faith in the transaction.¹³

The rule is, that where a person enfeebled in mind by disease or old age, is so placed as to be likely to be subject to the influence of another, and makes a voluntary disposition of property in favor of that person, the court requires proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donee.¹⁴

While age and disease may and do impair the mind, and are proper elements to be considered on the question of mental capacity to transact business, the mere circumstance that the mental powers have been impaired by age and disease is not alone sufficient to invalidate a deed if the grantor fully comprehended its meaning and effect and was able to exercise his will in executing it. The mental impairment that will render a deed invalid must be to the extent that the party making it was incapable of comprehending what he was doing and knowing the nature and effect of his act.¹⁵

The mental faculties of a person may be impaired by disease or old age, and yet he may have sufficient mental capacity to make a will or deed. He may be subject to delusions, but if they exert no influence upon the grantor in making a deed, he will not be incapacitated on that account to make a valid deed. If the grantor in a deed has sufficient capacity to comprehend the nature of the transaction and the effects of his acts, and can exercise his will in reference thereto, the deed will not be set aside on account of the mental incapacity of the grantor.¹⁶

It is well settled law that mere declarations of a grantor in a deed, not under the obligations of an oath, made either

13—*Dorsey v. Wolcott*, 173 Ill. 539.

16—*Essary v. Marvel*, 274 Ill. 576.

14—*Lewis v. McGrath*, 191 Ill. 401.

15—*McAyeal v. Hillison*, 291 Ill.

before or after the transaction, are not admissible to impeach the same.¹⁷

§ 1259. Grantor Not Mentally Incompetent—While the testimony may show that the grantor was a man of some peculiarities and eccentricities, that alone would not justify setting aside a deed executed by him. To justify a decree setting aside the deed on that ground, it must be shown that he was so mentally unsound as to be incapable of understanding the nature and effect of the transaction and protecting his interest. Partial impairment of the mental faculties of a grantor is not sufficient to authorize the setting aside of a deed made by him, if at the time of making it he has a full comprehension of the meaning, design and effect of his act.¹⁸

Mere mental weakness does not justify a court of equity to set aside an executed contract provided such weakness does not amount to an inability on the part of the afflicted person to fully comprehend the transaction.¹⁹

Although a man may be bodily feeble on account of old age, with hearing and eyesight impaired, yet if he has mental capacity to understand and transact any and all business relating to his property by will, deed or otherwise, his deed or will will not be set aside on account of mental incapacity to execute the same.²⁰

If he can understand the nature of his business and the effect of what he is doing and can exercise his will with reference thereto, his acts will be valid.²¹

The fact that a man may make indiscreet trades is not an evidence of the want of mental capacity. It is well known that men of a high order of mental capacity are very indiscreet traders.²²

17—Hart v. Randolph, 142 Ill. 521.

18—Beaty v. Hood, 229 Ill. 562;
Francis v. Wilkinson, 147 Ill. 370.

19—Saffer v. Mast, 223 Ill. 108;
Stone v. Wilbern, 83 Ill. 105; Eng-
lish v. Porter, 109 Ill. 285; Argo v.

Coffin, 142 Ill. 368; Sears v. Vaughn,
230 Ill. 572.

20—Vinson v. Scott, 198 Ill. 144.

21—Martin v. Harsh, 231 Ill. 384;
Shea v. Murphy, 164 Ill. 614.

22—Beaty v. Hood, 229 Ill. 562.

§ 1260. Deeds of Incompetents Only Voidable Not Void—Section 1 of Chapter 30 of the Revised Statutes of 1874, to the effect that every deed not procured by duress, but signed, sealed and delivered, the maker being of sound mind, of full age and discover, shall be sufficient, simply declares that certain things shall constitute a good deed—it does not by implication, negative that a good deed can not otherwise be made. And it was held that a deed made by a person alleged to be an idiot was not void but only voidable, and it would not be disregarded even in ejectment when equity required it to be sustained.²³

§ 1261. Deeds of Minors—The maker of a deed should be of full age. But deeds made by a minor are not absolutely void, but only voidable. Their validity does not depend upon a ratification after a minor attains his majority, but to avoid them he must by some clear and unmistakable act, disaffirm their validity. Notice that he disaffirms, followed by acts of ownership, or such as indicate a claim of title against the conveyance intended to be disaffirmed, such as taking possession, suit to regain possession or to cancel the deed, payment of taxes, selling, leasing or offering to sell or lease, improving the premises, or such like acts, within a reasonable time after arriving at age, have been held to be acts of disaffirmance and to limit the time of such disaffirmance.

Equity will not regard mere forgetfulness for a number of years after the minor reaches his majority, as any excuse for delay in disaffirming a deed made during his minority. The statute provides that a minor may bring his action within two years after the disability is removed. (Limitations, Ch. 83, Sec. 21.) Titles must rest on a more secure basis.²⁴

§ 1262. Habitual Drunkards—Statute—“Guardians and conservators of habitual drunkards may sue and be sued

²³—Burnham v. Kidwell, 113 Ill. 425.

²⁴—Tunison v. Chamblin, 88 Ill. 378.

under this act, in the same manner and with like effect as in case of idiots and lunatics.”²⁵

Courts will protect the party against his own acts done under a state of insanity, at his instance, or that of his conservator or representative, although he has brought on that condition by drunkenness.

Relief, in like manner, will be extended from acts done by a party when too drunk to exercise an agreeing mind, or a sound and disposing judgment; and in like manner when the act is done before restoration to such a state from the effects of drunkenness. But this may not be so where the other party may not be restored to the rights parted with.

So where it appears that for a number of years prior to the transaction sought to be set aside the party was an habitual drunkard, and when drunk he was a fool and crazy, and so far gone as to bring on stages of delirium tremens or mania potu; one so situated can hardly be called sane simply by becoming sober. After such a party has established a long continuous career of drunkenness, and craziness from it, it is not enough, or satisfactory, to show a mere sober interval of a few hours, or even a few days. It is not to be believed that the mind can so soon resume a healthy vigor after so much and so long derangement from such besotted habits. When the mind is thus broken down by a long course of dissipation, the feverish moments of a half sober, or even sober intervals, cannot be called a lucid interval, for the purpose of establishing the act of the party. To lay down such a rule would be but to invite the covetous and the crafty to seize the victim in an interval of his greatest physical agony and prostration as the one in which the mind alone is clear, free and judicious. All observation contradicts the inference of so instantaneous a mental recovery.²⁶

25—Sec. 8, Ch. 29, R. S.

26—Menkins v. Lightner, 18 Ill.

To render a transaction voidable on account of drunkenness of the party, the drunkenness must be such as to have drowned his reason, memory and judgment, and to have impaired his mental faculties to such an extent as to render him *non compos mentis* for the time being.²⁷

§ 1263. Deed by Trustee Conveys Legal Title—Whether a trustee rightfully or wrongfully transfers the legal title to real estate cannot be questioned in an action of ejectment; the legal title is in him and if he conveys it the legal title is transferred. If the trustee disposes of the property in violation of his trust, the remedy is in equity, and not at law.²⁸

In the execution of a deed under a power, while it is not essential that there should be a direct reference to the power, it is necessary that the conveyance should disclose the power and an intention to execute it should fairly and reasonably appear.²⁹

§ 1264. Abandonment by Spouse—Other May Dispose of Property—Statute—“In case the husband or wife abandons the other and leaves the State, and is absent therefrom for one year, without providing for the maintenance and support of his or her family, or is imprisoned in the penitentiary, any court of record in the county where the husband or wife so abandoned or not confined resides, may on application by petition, setting forth fully the facts, if the court is satisfied of the necessity by the evidence, authorize him or her to manage, control, sell and incumber the property of the other, as shall be necessary, in the judgment of the court, for the support and maintenance of the family, and for the purpose of paying debts of the other, or debts contracted for the support of the family. Notice of such proceeding shall be given as in ordinary actions, and anything done under or by virtue of the order or decree

27—*Martin v. Harsh*, 231 Ill. 384.

29—*Riemenschneider v. Tortoriello*,

28—*Graham v. Anderson*, 42 Ill. 287 Ill. 482.

of the court, shall be valid to the same extent as if the same were done by the party owning the property.”³⁰

§ 1265. Decree Under Statute in Case of Abandonment to Be in Conformity with the Statute—The decree should not take the property of the one and give it to the other. The provision of the statute is, that if the court is satisfied, by the evidence, of the necessity, it may authorize the abandoned spouse to manage, control, sell and incumber the property of the other as shall be necessary, in the judgment of the court, for the support and maintenance of the family, and for the purpose of paying the debts of the other, or debts contracted for the support of the family. Where there is no question as to the debts of the other, the court can only exercise judgment as to what is necessary for the support and maintenance of the family, by hearing evidence and providing such amount as in the judgment of the court is necessary. There might be cases where a court would commit to the abandoned spouse the management and control of the property upon such conditions as would protect the property and the rights of the owner, but it would be contrary to the statute to take the property of one and give it to the other, by an authority to sell or incumber the property and receive the proceeds. If the property is to be incumbered it would be necessary for the protection of the rights of the owner that the court should fix the amount of the incumbrance; and if it is to be sold, compliance with the statute would require the court to ascertain its value, the price at which it ought to be sold, the best investment of the proceeds, and any other matter necessary to protect the rights of the parties, and it would be necessary, by means of a trustee, or in some other way, to control the fund. It might be necessary to change the amount of the allowance on account of the changed condition of the family.³¹

30—Sec. 11, Ch. 68, R. S.

31—Brand v. Brand, 252 Ill. 134.

§ 1266. **Statute Authorizing Abandoned Spouse to Dispose of Property of the Other, Constitutional**—Naturally about the first question to be raised in considering a statute of this kind would be its constitutionality. And it was urged that the section deprived the owner of his property without due process of law by singling out from offenders, in general, against marital rights and duties, two classes of individuals without any apparent reason, and depriving them of their property. In reference to the class confined in the penitentiary, it was stated that such class was not under consideration because the party raising the question did not belong to it; in regard to the other class to which he did belong, it was stated that one who enters upon the marriage relation assumes duties and obligations in which the State is interested and which it may enforce. It is essential to the welfare of society and the State that the family should be cared for and supported, its integrity maintained and its members prevented from becoming the objects of charity or a public charge, and the relations of husband and wife and their rights and duties are subject to statutory enactments. The law charges the expenses of the family and the education of the children upon the property of both the husband and wife, and all these provisions are within the legislative control for the purpose of compelling the performance of marital duties. In regard to the abandonment feature of the statute it is true that the section only applies to a spouse who not only abandons his or her family, but to one who has also left the State and has been absent therefrom for one year. If the abandoning party remains in the State his property would be charged with the expenses of the family and the education of the children, and the section imposes no new duty upon him. The expenses of the family are chargeable upon both the husband and wife, but where the owner is out of the State no personal liability could be enforced by creditors. Although a party may free himself from personal liability

by removing from the State, yet this would not relieve him from his marital obligations, and he has no constitutional right to free his property in this State from such lawful charge. The section provides for a legal proceeding, service of process and a hearing, and there is no want of due process of law.³²

§ 1267. Acts of Abandoned Spouse Binding on Both Husband and Wife—Statute—“All contracts, sales or incumbrances made by either the husband or wife, by virtue of the power contemplated in the preceding section, shall be binding upon both, and during the absence or confinement, the person acting under such power may sue and be sued; and for all acts done the property of both shall be liable, and execution may be levied or attachment issued accordingly.”³³

§ 1268. No Abatement in Case of Return of Abandoning Party—Statute—“No suit or proceeding shall abate, or be in any wise affected by the return or release of the person absent or confined, but he or she shall be permitted to prosecute or defend jointly with the other.”³⁴

§ 1269. Proceedings to Annul Order of Court—Limitation—Statute—“The husband or wife affected by the proceedings contemplated in the two preceding sections may have the order or decree of the court set aside and annulled, by filing a petition therefor and serving a notice on the person in whose favor the same was granted, as in ordinary actions. But the setting aside such decree or order shall in no wise affect any act done thereunder.”³⁵

§ 1270. Service by Publication Sufficient—Where it was urged that personal service upon the defendant was necessary to give the court jurisdiction, the court replied that the absurdity of attributing to the General Assembly an intention that there should be personal service upon one beyond the limits of the State, where process could not go,

32—*Brand v. Brand*, 252 Ill. 134.

33—Sec. 12, Ch. 68, R. S.

34—Sec. 12, Ch. 68, R. S.

35—Sec. 13, Ch. 68, R. S.

is apparent. The argument for the necessity of personal service is based upon the language of the section in providing for notice of the proceeding as in ordinary cases. The rule that the word "action" is only applicable to proceedings at law, and is not properly applied to suits in equity, may be, in a narrow sense, correct, but it can only be applied where there is nothing requiring a different construction. In a comprehensive sense, and as a general rule, the words "suit" and "action" are synonymous, and are used interchangeably to mean any legal proceeding in court for the enforcement of a right. The term "ordinary action" was not used in this section to designate an action at law. As to non-residents of the State constructive service may be had by publication in actions for the enforcement of a right in specific real or personal property which is subject to the jurisdiction of the court.³⁶

§ 1271. Solicitor's Fees Allowable in Proceedings Against Abandoning Spouse—The solicitor's fees are a necessary expense in securing the rights of the petitioner and are to be classed as an expense incurred in the support and maintenance of the family, but the duty is committed to the court to ascertain how much is necessary for that purpose.³⁷

§ 1272. Undue Influence in the Execution of a Deed—The law is that a deed or other conveyance which has been procured by undue influence, if it be not ratified by the party making it after the undue influence has ceased to operate, it may be set aside after his death at the suit of those who succeed to his rights.³⁸

The undue influence which will avoid a deed or will must go to the extent of depriving a party of his free agency, and such influence must operate at the time of the transaction sought to be impeached. So where a grantee was not present at the time the deed was executed by the gran-

36—*Brand v. Brand*, 252 Ill. 134.

38—*Rickman v. Meier*, 213 Ill. 507.

37—*Brand v. Brand*, 252 Ill. 134.

tor, undue influence is not established, as that term is used in the law.³⁹

Mere advice, argument or persuasion, if the grantor's mind acts freely thereunder, does not constitute undue influence, though it may lead to the making of the instrument when it would not otherwise have been made. A deed may not be avoided on the ground of undue influence where its execution was procured by honest argument or persuasion, untainted by fraud.⁴⁰

The influence which vitiates an instrument must be wrongful. Influence secured through affection is not wrongful, and when an instrument is made in favor of a child at his solicitation and because of partiality, influenced by affection for him, it will not be void because of undue influence.⁴¹

While undue influence may be established by circumstantial evidence, yet when all the circumstances relied upon are equally consistent with some other rational theory deducible from the facts proved, it cannot be held that the charge of undue influence is established.⁴²

In determining the question of undue influence, a broad distinction is taken between a disposition by the donor which takes from him his whole estate and leaves him helpless, and one which provides for him during his life, and disposes of his property in a rational mode after his death.⁴³

Where the charge in the bill is that the deed was not executed by the grantor, or was obtained by fraud and circumvention, the bill is not sustained by proof that the deed was executed through the exercise of undue influence.⁴⁴

§ 1273. Deed from Parent to Child—from Child to Parent
—A gift made by a parent to a child on account of the

39—Fitzgerald v. Allen, 240 Ill. 80; Sears v. Vaughn, 230 Ill. 572; Pittenger v. Pittenger, 208 Ill. 582; Biggerstaff v. Biggerstaff, 180 Ill. 406; Shea v. Murphy, 164 Ill. 614.

40—Bishop v. Hilliard, 227 Ill. 382.

41—Fitzgerald v. Allen, 240 Ill.

80; Dickie v. Carter, 42 Ill. 376; Burt v. Quesenberry, 132 Ill. 385.

42—Sears v. Vaughn, 230 Ill. 572.

43—Oliphant v. Liversage, 142 Ill. 160.

44—Kosturska v. Bartkiewicz, 241 Ill. 604.

affection of the former for the latter, even when it is made at the solicitation of the child, is not the object of suspicion, and there is no presumption against its validity unless the relation between them is something more than ordinary parent and child.

Where, however, the natural position of the parties has become reversed, where the parent defers to, trusts in and yields to the child, where there exists between them what the law has termed a fiduciary relation, in which the parent is dominated by the child, and where the child prepares, or causes to be prepared and executed, an instrument conveying to him property of the parent, as a gift or upon a grossly inadequate consideration, the presumption arises that the transfer was obtained through his undue influence, and the burden rests upon him to show that the conveyance was the result of full and free deliberation on the part of the parent. This is not peculiar to transactions where the parties are parent and child, but is the law in any cases where fiduciary relations exist, where the conveyance is from a dependent to the dominant party, and where the grantee prepares or procures the preparation of the deed or other instrument; the rule is applied, under such circumstances, wherever the relation exists, no matter whether the parties are related by blood or not.⁴⁵

There is no presumption of law that a conveyance from a parent to a child, from the mere fact of relationship, is the product of fraud. And in order to set aside such a conveyance upon such grounds there must be proof of fraud or undue influence in fact, or evidence of confidential relations.⁴⁶

Proof that a deed was executed by a father to a son out of a strong desire on the part of the father to reward his son and his wife for the care bestowed on him in his old age, and that the father himself procured a lawyer to draw

45—*Rickman v. Meier*, 213 Ill. 507. 80; *Bishop v. Hilliard*, 227 Ill. 382;

46—*Fitzgerald v. Allen*, 240 Ill. Newman v. Workman, 284 Ill. 77.

the deed in the absence of the grantee, and explained his reasons to the lawyer for making the deed, overcomes the presumption of unfairness arising from the fact that the grantee was his son, and his confidential and legal adviser.⁴⁷

§ 1274. Wife May Own and Convey Property—Statute—

“A married woman may own, in her own right, real and personal property obtained by descent, gift or purchase, and manage, sell and convey the same to the same extent and in the same manner that the husband can property belonging to him.”⁴⁸

A deed made by a husband to his wife must be considered and construed the same as though it had been made to a third person.⁴⁹

And a deed made by a husband to his wife, if for a good consideration and in good faith, will be upheld, although the husband may be in failing circumstances at the time of the conveyance.⁵⁰

And a husband may prefer his wife, if he be indebted to her, to his other creditors, if in so doing he acts in good faith.⁵¹

And he may convey property to his wife voluntarily although he may at the time be in debt, provided he retain sufficient property to pay his debts then existing.⁵²

It will not be presumed from the mere fact that the name of the wife follows that of the husband in the premises in the deed that she thereby intended only to convey or release her dower interest in the property; where it appears by the deed that she is one of the parties conveying, she thereby conveys all her interest in the land.⁵³

47—Ball v. Ball, 214 Ill. 255.

48—Sec. 9, Ch. 68, R. S.—“Husband and Wife.”

49—Barrows v. Barrows, 138 Ill. 649.

50—McMannis v. Mills, 19 Ill. App. 398; McQuown v. Law, 18 Ill. App. 34; Payne v. Miller, 103 Ill. 442.

51—Rubershausen v. Atwood, 19 Ill. App. 58.

52—Nichols v. Wallace, 31 Ill. App. 408; Yazel v. Palmer, 81 Ill. 82; Majors v. Everton, 89 Ill. 56.

53—Lake Erie & W. R. R. Co. v. Whitham, 155 Ill. 514.

§ 1275. Duress May Be Ground for Setting Aside a Deed

—But a conveyance although it may have been obtained by duress, still it is not absolutely void, but only voidable, and if ratified after the removal of the coercing influence, it cannot thereafter be avoided.⁵⁴

Duress is defined to be a condition which exists where one by an unlawful act of another is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will. There must be such compulsion affecting the mind as shows that the execution of the contract or other instrument is not the voluntary act of the maker.⁵⁵

To justify the setting aside a deed on the ground of duress the grantor must, at the time of its execution, have been in such fear of his life or of bodily harm in case of refusal, as to so affect the mind that the execution of the deed was not his free and voluntary act. Mere vexation, annoyance and threats of personal injury, or imprisonment for which there is no ground, or threats of criminal prosecution, do not constitute duress where no proceedings have been commenced and no warrant issued. Exhibiting a pistol to and slapping the grantor, to induce him to sign a deed, when the acts take place some time before the signing of the deed, do not constitute duress, where it appears that the grantor did not conclude to sign the instrument until after deliberation and taking advice. Threats, abuse and assaults which do not compel the grantor to make the conveyance, in law, do not amount to duress.⁵⁶

§ 1276. Corporation as Grantor—When it appears from the minutes of the board of directors of a corporation that a resolution was adopted directing the president of the company to sell a tract of land and to execute the necessary deed therefor, under the corporate seal, and the president subsequently refuses to act as president, and the vice presi-

54—Bogue v. Franks, 199 Ill. 411.

Citing a large number of authorities.

55—Harris v. Flack, 289 Ill. 222.

56—Hintz v. Hintz, 222 Ill. 248.

dent assumed to discharge the duties of the president, and, in strict conformity with the resolution, conveyed the land by deed, under the corporate seal, signing as vice president, and acting president, but the deed was not countersigned by the secretary, as required by the by-laws of the company, it was held that the deed was well executed, and was amply sufficient to convey the title of the company.

While it is usual for the secretaries of such companies to attest the execution of such instruments, as the keeper of the seal, yet, if the charter of the company does not require such attestation, the deed will be good without it; strangers dealing with the company are not bound to know the provisions of the by-laws, and are not bound by them. They can only be expected to see that such instruments are executed in the usual form by the head of the company.⁵⁷

The following form has been approved as a proper execution of a deed by a corporation:

“In witness whereof the said Mississippi and Atlantic Railroad Company has caused these presents to be signed by its vice president, acting as president by reason of a vacancy in the presidency, and their corporate seal to be thereto affixed the day and year first above written.

John Brough,

(SEAL) Vice-Pres., and Acting Pres., M. & A. R. R. Co.”⁵⁸

But it is suggested that the following is a better form: “*In witness whereof* the said Mississippi and Atlantic Railroad Company has caused its name to be subscribed to these presents by its Vice President, acting as President by reason of a vacancy in the office of President, and its corporate seal to be hereto affixed, attested by its Secretary, the day and year first above written.

Mississippi and Atlantic Railroad Company,
by John Brough, its Vice President, acting
President of said Company.

ATTEST:

(SEAL) John Jones, Secretary of said Company.”

57—Smith v. Smith, 62 Ill. 493.

58—Smith v. Smith, 62 Ill. 493.

§ 1278. **Quasi Corporations as Grantors**—It is a familiar doctrine, of general recognition by the courts, the counties and political divisions of the state for governmental purposes, only possess a low order of corporate existence, and for this reason are generally designated “Quasi corporations,” and are conceded to possess no powers except such as are expressly conferred or exist by reason of necessary implication. In conformity with this well recognized principle it was settled in an early period in our judicial history and the rule has been steadily adhered to ever since, that a county has no power to give away or otherwise dispose of its funds or property for a purpose not authorized by law. So unless the facts come within the law authorizing counties to act and convey their lands, a trust deed executed to secure the bonds of a county issued in payment of its subscription to the stock of a railroad company, will be held to be illegal. And the foreclosure of such a trust deed in a United States court will have no binding force upon persons not made parties thereto. And where such persons acquire their title in a lawful manner from the county, they may maintain a bill to remove a deed procured under such foreclosure proceedings, as a cloud upon their title.⁵⁹

§ 1279. **Forged Deed**—It may be remarked here that a forged deed is absolutely void and of no effect whatever, however innocent the party claiming under it may be.

A party obtaining title to land under a forged instrument acquires no title to the land which can prevail over the true title.⁶⁰

§ 1280. **Name of Grantee Essential in Deed**—It is a principle generally received that an instrument, purporting to be a deed, without the name of the grantee inserted in it, at the time of its execution, is no deed, and conveys no interest to the party whose name is afterwards inserted

⁵⁹—*Scates v. King*, 110 Ill. 456.

⁶⁰—*Porter v. McNabney*, 77 Ill.

therein as grantee. And such a deed cannot be available as a monument of title.⁶¹

Equity will disarm a party of such a title as against the true owner, who has himself been guilty of no wrong.⁶²

It was urged that a deed without the name of the grantee in it, to be placed therein when a grantee was found, is no more than the execution of a power of attorney to make a deed out and out. But the court replied that the law was the other way, citing Blackstone to the effect that in every grant there must be a grantor, a grantee, and a thing granted. That if any of these were omitted the deed was void: It might be very convenient, and probably produce no injury to any interest of society, that a party, wishing to sell a tract of land, should be permitted to execute and deliver a deed to an agent, with a blank for the name of the grantee, to be filled in when a purchaser was found, but the law does not permit it. The courts are organized to administer the law, not to make it. One of the most valuable principles pervading our jurisprudence is, that system of law is best which confides as little as possible to the discretion of the judge,—that judge the best, who relies as little as possible on his own opinion.⁶³

Although the name of the grantee may be omitted from the granting clause in the deed, yet if it can be gathered from the instrument who the grantee was intended to be, the instrument will not be held to be invalid on account of such omission.⁶⁴

If the grantor disclaims any interest in the land such disclaimer amounts to a ratification of the acts of the agent of the grantor.⁶⁵

§ 1280a. Deed to Grantee by Description—The object of names being merely to distinguish one person from an-

61—Chase v. Palmer, 29 Ill. 306;

Winchester F. I. Co. v. Jennings, 70

Ill. App. 359; Mackey v. Barton, 194

Ill. 446.

62—Whitaker v. Miller, 83 Ill. 381.

63—Chase v. Palmer, 29 Ill. 306.

64—Richey v. Sinclair, 167 Ill. 184.

65—Donason v. Barbero, 230 Ill. 138.

other, it seems to be sufficient for this purpose though the true name of the party be not used, or even no name at all. The general principle of law is, *id certum est quod certum reddi potest*, and a man may be described by his office, or his relationship to a known person. So where a deed was made to a corporation in which the name of the corporation was fully or correctly stated, and it appeared that there was no other corporation organized for a like purpose, it was held that the deed conveyed a good title to the corporation, sufficient to enable it to recover in ejectment.⁶⁶

§ 1281. Deed to the Heirs of a Living Person—It is a well settled rule that a conveyance of a present estate to the heir or heirs of the body of a living person is void for uncertainty, because those who will take as heirs cannot be known until the person's death.

A grant to the heirs of a living person has been construed as meaning children where such has plainly appeared to be the intention of the grantor. In cases where expressions are used in connection with the technical words which clearly indicate that such technical words are not used in accordance with their technical signification, they will not be so construed.⁶⁷

§ 1282. Presumption of Law as to the Grantee—In the absence of evidence to the contrary, the presumption of law is that the grantee in a deed is a bona fide purchaser from the grantor.⁶⁸

§ 1283. Grantee Must Be in Being—A grantee must be in esse at the time the deed is executed, otherwise no title will pass by the deed. The common law did not treat children *en ventre sa mere* as persons *in esse* for the purpose of holding or acquiring property. This capacity only attached upon their birth alive. Consequently by the old

66—*Preachers Aid Society v. England*, 106 Ill. 125.

68—*Pickett v. Hartsock*, 15 Ill. 279.

67—*Ætna L. I. Co. v. Hoppin*, 249 Ill. 406; *Dubois v. Judy*, 291 Ill. 340.

common law children born after the death of the ancestor were precluded from participating with the others in the distribution of the intestate estate. But this harsh rule has been greatly changed by statute. There is no doubt in regard to a posthumous child being entitled to inherit property under our existing laws and also to take by devise, but an unborn child has no such existence as will enable it to take a present grant of lands by deed. And a deed to an unborn child may be avoided by showing that the grantee came into being subsequently to the delivery of the deed.⁶⁹

So where a deed ran to a woman and her children it was held that a child, born after the delivery of the deed, took no interest in the property by virtue of the deed.⁷⁰

§ 1284. Grantee Presumed to Be in Being—The legal presumption is that where a deed is made to a certain grantee that there is a person of the name of the grantee and that he is the person the grantor intended to convey the land, and by such conveyance the title to the land becomes vested in him. This presumption is operative and must prevail as against all other persons claiming title through the same grant, or by subsequent conveyances from the same grantor, until it is shown in some mode which is binding upon the named grantee, if there be such a person, or upon his legal representatives, if there are such, that his name was inserted in the deed by mistake, and that the real purchaser or grantee was not him but some other person. And where it was claimed that there was not, and never had been, a person of the name of the grantee, and it would, therefore, be idle for the party claiming the title to have named him, or his legal representatives, as defendants to a partition proceeding, it was answered that the claim assumed the very fact which needed to be determined upon

69—*Morris v. Caudle*, 178 Ill. 9.

70—*Faloon v. Simshauser*, 130 Ill.

649.

a judicial investigation, in order to free the title from the defect either real or apparent growing out of what is alleged to have been a mistake in the deed. And it was manifestly necessary that such judicial determination, in order to be of any avail should be had in a proceeding which would be binding upon the grantee and his representatives, if any such persons were in actual existence. The solemn declaration of the deed is, that at the time it was executed there was a person of the name of the grantee, and that it was the intention of the grantor to make the conveyance to him, and before the title of those claiming to be the true owners can be relieved from this defect thus created, so as to be free from all reasonable doubt on that score, the grantee, whether a real or fictitious person, and those who have succeeded to his estate in case he is dead, must have their day in court, and have thus been subjected to the jurisdiction of a tribunal having power to adjudicate upon their rights. But where this is not done the decree obtained in a partition proceeding is ineffectual, and leaves the title conveyed by the deed still apparently vested in the grantee, or his legal representative.⁷¹

§ 1285. Deeds to and by a Partnership—A conveyance to a partnership, in the partnership name, is insufficient to convey the legal title, and is valid only as a contract to convey, and vests only an equitable interest in the partnership. So where a deed was made to a trustee in trust for a partnership, the title will remain in the trustee, subject to the rights of the partnership to obtain, through equity, the legal title to the land, as the rights of the parties may appear.⁷²

But it has been held that where a deed is made to a firm, as to Cushman, Eaton & Co., a deed executed by Cushman and Eaton and one Benjamin Thompson, and

71—Mead v. Altgeld, 136 Ill. 298.

72—Silverman v. Kristufek, 162 Ill.

their wives, where there was evidence that Thompson was a member of the firm, and the fact that these persons assumed to have an interest in the property, and there was no proof of that any one else ever claimed adversely to the grantee in the deed, as a member of the firm, this was sufficient evidence that the deed was made by Cushman, Eaton & Co.⁷³

§ 1286. Corporations as Grantees—It is now generally conceded that a corporation cannot acquire title to real property in this State, against the objection of the State, except such as may be reasonably necessary to carry out the object of its creation. Many of the reasons for this doctrine are found in the chapter on the Statute of Uses and Trusts.

Irrespective of the operation of statutory restrictions, it is a settled principle of American jurisprudence that a corporation cannot take and hold land, except as above specified.

These bodies, which never die, are not allowed, against the objection of the State, to take and hold land for purposes wholly foreign to the purposes for which the State endowed them with corporate existence and the power of perpetual existence. The Supreme Court of Illinois has declared that it is against the public policy of the State to allow corporations to own real estate beyond what is necessary for the transaction of their corporate business, or such as is acquired in the collection of its debts. And in furtherance of this public policy statutes have been enacted by the General Assembly requiring all corporations which have acquired lands in the collection of debts to sell and dispose of all that is not necessary for the purposes of the corporation, and provided remedies designed to coerce compliance with such requirements.

Implied power cannot be invoked to authorize a corporation to engage in collateral enterprises but remotely connected with the specific purposes it was created to accom-

73—Lyman v. Gedney, 114 Ill. 388.

plish. A power which a corporation may exercise by implication must be bounded by the purposes of the corporate existence and the terms and intention of the charter, and acts which tend only remotely and by indirection to promote its interest and charter objects cannot be justified by implication of law, but are *ultra vires*.

But a corporation, under a grant of power to acquire and hold such real estate as may be necessary for the prosecution of its business, may purchase a building site and erect a building thereon for its headquarters of sufficient size to meet its future prospective business for office rooms, and may rent the rooms not occupied by it or needed for its immediate use.

It may also acquire and hold vacant lands adjoining its plant, used for the purpose of dumping debris, but ultimately intended for the extension of its plant.

It may also, in erecting its manufacturing buildings, place therein boilers of larger capacity than its present needs, but which will be needed in producing steam for the operation of such extended works, and in the meantime sell its surplus steam to an adjoining manufactory.

It is entirely competent and proper for a corporation to keep in view its probable future wants and necessities, and in constructing its buildings and purchasing machinery to anticipate and provide for that which sound practical judgment and wise forethought indicate will be required by the growth of its business and the extension of the volume of its operations. And in doing so it is but true economy, and in no sense a usurpation of power to dispose of the excess not required for its present use, so that the same should not go to waste.

The prohibition of law against the unauthorized exercise of power by corporations is based upon grounds of public policy, and the wisdom of the rule may find many exemplifications.⁷⁴

⁷⁴—*People v. Pullman P. Car Co.*,
175 ILL. 125.

The public policy of the State of Illinois is to be determined, in a large measure, from its constitution and legislation, judicial decisions and the practice of its executive departments. Where the legislature has acted upon a particular subject upon which it has power to legislate, public policy is what the statute indicates. From the time of the enactment of the general Incorporation Law it has been uniformly held that the acquiring and holding of real estate are not purposes for which a corporation may be organized. If this holding had been contrary to the legislative intention the legislature might have been expected by some enactment to so declare. It has not done so. The question, after repeated examination, has become well settled, and no reason appears why the rule heretofore announced by the court should be departed from. If any change is demanded by the public interest it must be left to the legislature to make it.⁷⁵

It has been said, by the court in *arguendo*, that a deed to a corporation, although regularly organized and licensed to deal in real estate, acquired no legal or equitable title to the real estate assumed to be conveyed to it, because it was incapable in law of taking or holding such real estate.⁷⁶

The rule against corporations acquiring and holding the title to real estate applies to leases for a term of years. Such a lease is a chattel real, and conveys an interest in the land. While it has some of the attributes of personality, it is treated in many respects as realty.⁷⁸

Where a corporation has the power to purchase and hold real estate for a specified purpose, the title to the land will pass, although the corporation may have exceeded its powers. Whether the corporation has exceeded its powers in making the purchase, is a question between the corporation and the State, with which the grantor has no concern. The

75—*People v. Shedd*, 241 Ill. 155.

78—*People v. Shedd*, 241 Ill. 155.

76—*Hull v. Glover*, 126 Ill. 122.

right of a corporation to take and hold real estate cannot be made a question by any party but the State. The State alone must assert her policy in that regard.⁷⁹

In the case of *Rector v. Hartford Deposit Co.*, 190 Ill. 380, which was a suit by the appellee against the appellant for the recovery of rent, there was presented by the appellee, and the court refused to hold as law the following proposition:

“The court holds as a proposition of law in the trial and decision of this case, that the plea of *ultra vires* (filed by the defendant) may be successfully interposed in a collateral proceeding where the corporation is alleged to have performed an act which is not, under any circumstances, authorized to perform, but where the act is one which at most is a mere abuse or excessive use of a general power conferred upon the corporation by its charter, such plea cannot be successfully interposed, because the question of *ultra vires* can in such cases be raised only by direct proceedings by the State to oust the corporation of its usurped powers.”

In regard to this proposition the court says: “This proposition presented the correct legal doctrine, as we think. That the appellee company possessed ample power to acquire real property and construct a building thereon for the purpose of transacting therein the legitimate business of the corporation is beyond the range of debate. Nor is the contrary contended, but the insistence is that under the guise of erecting a building for corporate purposes the appellee company purposely constructed a much larger building than its business required, containing many rooms intended to be rented to others for offices and business purposes, among them the basement rooms contracted to be leased to appellant, and that in so doing it designedly exceeded its corporate powers. The position of the appellant, therefore, is, that the appellee corporation has

⁷⁹—*Barnes v. Studdard*, 117 Ill. 237.

flagrantly abused its general power to acquire real estate and construct a building thereon. Conceding that position to be correct, we do not think it can be availed of as a defense in an action brought by the corporation to recover rent contracted to be paid for the use of one of the rooms of the building."

"We think it has never been held in this State, or understood to be the law, that the question whether such power has been abused could be raised and availed of in a defense in a proceeding wholly collateral to the question of the right or power of the corporation in the premises. The earlier decisions of this court are to the effect that a corporation having general power to own real estate for corporate purposes, and to acquire real estate in collecting debts due it, may be required to answer to the State only, for an alleged usurpation of power in respect to the ownership and enjoyment of landed property." The question whether a corporation has power to do a certain act cannot be raised collaterally, but only in a direct proceeding brought in behalf of the people for that purpose.⁸⁰

The State, acting in its character as a sovereign, is not bound by any statute of limitations or technical estoppel. It is the general rule that laches, acquiescence, or unreasonable delay in the performance of a duty on the part of officers of the State, is not imputed to the State when acting in its character of a sovereign. And the demand of the sovereign that usurpation on the part of a corporation clearly antagonistic to good public policy should not be restrained or defeated by any imputation of laches, or upon the ground that acquiescence may be inferred from a failure to invoke the aid of the courts at an earlier day.⁸¹

§ 1287. Unincorporated Societies and Associations as Grantees—It frequently happens that unincorporated so-

80—*Rector v. Hartford Deposit Co.*, 190 Ill. 380; *Hayden v. Hayden*, 241 Ill. 183.

81—*People v. Pullman P. Car Co.*, 175 Ill. 125; *People v. Shedd*, 241 Ill. 155.

cieties or associations, especially those organized for religious purposes, become interested in real estate, either by deed directly to them as such or to trustees for their benefit, and a number of important questions arise in regard to the rights of such societies and associations, which are entitled to careful consideration.

(1) What are the essentials of such societies or associations?

(2) Do such societies or associations acquire any rights which can be enforced, either at law or in equity?

(3) If they do, how shall such rights be evidenced?

(4) In case such rights are acquired through trustees, is it necessary that such trustees should be named individually?

(5) In case such societies become incorporated do they succeed to the rights of the unincorporated organization?

(1) It is essential to the creation of a trust in behalf of a religious society that there should be a society formed for religious purposes, although not incorporated, which paid from its funds the purchase price or some definite part of it. If there be an organized religious society which furnished the purchase price of the real estate, the fact that the society had not become incorporated would make no difference in equity, where the trust would be upheld and enforced.⁸²

Where a religious society which was the beneficiary of a trust fund has abandoned all its purposes for a long period of years, having no meetings for religious instruction nor pastor, and its meeting house becomes dilapidated and uninhabitable, the society must be regarded as dissolved. And where a bill is filed by the heirs of the testator to construe the will and determine who is the owner of the fund, the fact that a few persons, former members of the society, met and elected trustees of the society will

82—*Marie M. E. Church v. Trinity*
M. E. Church, 205 Ill. 601.

not be sufficient to revive the society and entitle it to the fund.⁸³

(2) In the case of *Hart v. Seymour*, 147 Ill. 598, it appeared that the Norwood Land and Building Association was an unincorporated joint stock association, composed of a number of persons, and the form of their organization, the nature of their business enterprise, and their respective rights, duties and obligations, were evidenced by a trust agreement, signed and acknowledged by each of the associates. The articles of association were elaborate and are set forth quite extensively in the opinion of the case. By them James E. Tyler, John F. Eberhart and George Field were created trustees to carry into effect the articles of agreement, and were to take the title of all property owned or held for the benefit of the association, in their individual names, in fee simple, as joint tenants and not as tenants in common, to them and their assigns, and to the survivors or survivor of them, and to his heirs, assigns and successors. The articles of agreement imposed certain duties and obligations on the trustees, and it was an active and not a passive trust.

A certain Mrs. Bishop purchased a block of land from the trustees, and executed her notes for the unpaid purchase money, and also a trust deed to Charles H. Field as trustee to secure the payment thereof on the premises. Part of the notes not being paid at maturity suit was commenced upon them and a judgment *in personam* recovered against Mrs. Bishop. On this judgment an execution was issued and levied upon property belonging to Mrs. Bishop, other than that described in the said trust deed, and through it title was made in Tyler, Field and Eberhart, trustees of the association.

The sale did not produce enough to pay the amount of the judgment, and Tyler, to whom the notes were made payable, afterwards commenced an attachment against Mrs.

83—*Miller v. Riddle*, 227 Ill. 53.

Bishop on the balance due on the notes, and levied on the lands described in the trust deed, which finally resulted in a deed by the sheriff to Tyler, Eberhart and Field, the trustees. On a bill filed by the heirs of Mrs. Bishop, to redeem from these sales, it was insisted that the title of Mrs. Bishop to the lands was not divested by the sheriff's deeds. The argument on which this contention was based was that the trust agreement, although recorded, was not an instrument entitled to be recorded, and did not operate to affect the title to the lands in controversy; that in determining the validity of the title conveyed, only the deeds themselves were to be considered, and that the trust declared in the deeds is one which is executed by the statute of uses; but as the usee was an unincorporated association, and incapable as an association of taking and holding lands, the trust for that reason could not be executed, and the deeds themselves must be held to be void. To this the court replied that if the question of title is to be determined solely from what appears on the face of the deeds, it is not sufficiently shown that any trust whatever was declared, and much less that the trust was one which the statute of uses would execute. The deeds run to Tyler, Field and Eberhart, "trustees of the Norwood Land and Building Association," and to "their heirs and assigns forever." This of itself was no declaration of trust but, *prima facie*, an absolute title to the grantees named. (In support of this proposition the court cites the case of *Tower v. Hale*, 46 Barb. 361, and *Den v. Hay*, 21 N. J. L. 174, which clearly support the court.)

But the court was not prepared to hold that there was any such incapacity in the beneficiary or beneficiaries named in the deeds as would render the conveyance void, even if such trust had been thereby created or declared as would have been executed by the statute of uses. The association, not being incorporated, was, in contemplation of law, a mere co-partnership, composed of the several associates

who executed and thereby became parties to the trust agreement, and the name adopted by the agreement may be regarded as their firm or partnership name. The co-partners were all natural persons, whose identity was fixed and ascertained by the agreement itself. The grantees in the deeds, therefore, if they took the land in trust, took it in trust for their firm, composed of ascertained partners, all capable of becoming beneficiaries of the trust. The deeds, therefore, are not such as may be considered as creating a trust which may be held void by reason of the incapacity of the beneficiaries to take and hold the title.

Neither was the court prepared to yield its assent to the view that, in determining the equitable rights of the parties, the trust agreement is not to be taken into account.

By that agreement the association embarked in the business of buying, improving, subdividing, developing and selling suburban property in or near the City of Chicago, and with a view of having that business carried on with greater efficiency and convenience, three of their number were appointed trustees, to take and hold the title to the lands purchased, control, improve, subdivide and sell the same, and to have general control of the affairs and business of the association.

It follows, necessarily, that the equitable rights of the parties must be determined by the provisions of the agreement. The nature of the trust in accordance with which the trustees took title, is to be determined by the trust agreement, and by that alone. There can be no doubt that the trust thus created was an active one, and one which involved the exercise of powers and the performance of duties which rendered it necessary that the trustees should hold the legal title, in order to the performance of their duties and the exercise of such powers. That being the case the Statute of Uses had no application.⁸⁴

(3) In the case of *Hart v. Seymour*, 147 Ill. 598, it will

84—*Hart v. Seymour*, 147 Ill. 598.

be noticed that the interest of the unincorporated association was evidenced by the written articles of agreement. In the case of *Debs v. Egli*, 167 Ill. 514, it is said: "The deed contained no express declaration of trust, nor is there any separate written declaration of trust by the trustees. The proof clearly shows, however, that the property was to be held for the benefit of the society or congregation," a religious organization. It is fair to presume that the proof here referred to was oral evidence.

(4) While it is necessary that the grantees in a deed should be sufficiently described, yet the rule does not require such parties should be designated by the usual method of giving their full name, and any other description will suffice which designates them from all other persons, as, where one is described by his office or by his relation to other persons. So it was held that a deed to a woman "and her children" conveyed the premises to her and her children living at the time of the execution of the deed as tenants in common.⁸⁵

A deed to "the heirs at law of A. B., deceased," will completely vest the legal title of the grantor in the heirs at law of A. B. without naming them, leaving them, however, to establish their identity when questioned.⁸⁶

(5) The case of *Alden v. St. Peter's Parish*, 158 Ill. 631, was a bill filed to set aside two certain deeds and for the partition of the property. The bill represented that James S. Waterman at a certain time was the owner in fee simple of the premises described in the deeds; that he and his wife, both deceased, made and delivered to the "rector, church wardens and vestrymen of St. Peter's Parish in the City of Sycamore, and the diocese of Illinois," deeds of the lands in question, the expressed consideration in each deed being "the love and affection" the grantors bear for the Protestant Episcopal Church and said parish. One of

⁸⁵—*Faloon v. Simshauser*, 130 Ill.

⁸⁶—*Low v. Graff*, 80 Ill. 360.

the deeds contained a condition and reservation that it was made upon the express condition and trust that the rents, issues and profits of the land be devoted and used for the payment, so far as it may go, of the salary of the rectors of said parish forever, and for no other purpose. The other deed contained no declared trust but contained a prohibition against removing or destroying the houses thereon and that the premises should be used for church purposes only.

In the opinion of the court, rendered by Mr. Justice Carter, it is said: "The conveyances in question were made to the rector, church wardens and vestrymen of this unincorporated religious society, the one conveying one hundred and sixty acres being upon the express condition and trust that the rents, issues and profits be devoted to and used for the payment, so far as it may go, of the salary of the rectors of said parish forever, and the other, conveying the lots, being conditioned that they were to be used for church purposes only. Both were given for the consideration of love and affection for the church and parish. It is clear that these conveyances constituted a gift in trust for a charitable use. And in such a case a court of equity will be inclined to lend its aid in carrying out the purpose of the donor and give effect to the trust if it can be done consistently with existing laws."⁸⁷

Certain property was conveyed to "Silas P. Brand, William Tillman and John Booth, trustees of the 'Bethany Church of Highland Park, County of Lake and State of Illinois.'" The deed contained no express declaration of trust, nor is there any separate written declaration of trust by the trustees. The proof clearly showed, however, that the property was to be held for the benefit of the society or congregation. After the acquisition of the property a religious controversy arose among the members of the

⁸⁷—Alden v. St. Peter's Parish,
158 Ill. 634.

society and certain of them seceded therefrom. The seceders constituted a minority of the members, and after the separation the remaining members became incorporated, under the act of 1872, in regard to religious corporations, under the name and style of "The Bethany Church and Society" of Highland Park, Lake County, State of Illinois. It is to be gathered from the opinion that at the time of the purchase of the lot the church was unincorporated, and so remained till it became incorporated as above stated.

Section 41 of the act of 1872 in regard to corporations provides that "upon the incorporation of any congregation, church or society, all the real and personal property held by any person or trustees for the use of the members thereof, shall immediately vest in such corporation and be subject to its control, and may be used, mortgaged, sold and conveyed the same as if it had been conveyed to such corporation by deed; but no such conveyance or mortgage shall be made so as to affect or destroy the intent or effect of any grant, devise or donation that may be made to such person or trustee for the use of such congregation, church or society." Under this statute it has been held that an organization under the statute by the majority of a society operates as a transfer of the rights and interests of the individual members to the corporation thereby created. And changing the name of the incorporated church, different from that of the unincorporated church, did not affect the question as to the title to the property.⁸⁸

§ 1288. Grantee with Notice of Legal or Equitable Rights of Third Parties—While the law will protect the rights of innocent grantees, who take title without notice of the legal or equitable rights of third parties, the rule does not apply to those who take with such notice or to those who by their negligence may induce third parties to deal with their grantors in good faith.

88—Dubs v. Egli, 167 Ill. 514;
Happy v. Morton, 33 Ill. 398; An-
drews v. Andrews, 110 Ill. 223.

The rule is, that a party taking with notice of an equity takes subject to that equity. The full meaning of this rule is, that the purchaser of an estate or interest, legal or equitable, even for a valuable consideration, with notice of any existing equitable estate, interest, claim, or right in the same subject matter, held by a third person, is liable in equity to the same extent and in the same manner as the person from whom he made the purchase. His conscience is equally bound with that of his vendor, and he acquires only that which his vendor could honestly transfer.⁸⁹

If a grantee fails to place his deed upon record, and permits the grantor to remain in possession of the property, he is not to be regarded as an innocent grantee, as to those he has induced to give credit to the grantor upon faith of the grantor's claim of ownership of the property.⁹⁰

Where a grantee accepts a deed from the grantor, knowing that the grantor is enjoined from transferring his property pending litigation, such acceptance is a strong circumstance indicating that the grantee did not act in good faith.⁹¹

§ 1289. Consideration Essential to Conveyance—A consideration is essential to a conveyance which is operative under the statute of uses, since a use cannot be raised without a sufficient consideration; and a deed of bargain and sale, such as a warranty deed, is not effective without a consideration.

At common law it was not necessary that a consideration should be expressed in a deed of bargain and sale, and where no consideration is expressed extrinsic evidence is admissible to show a consideration.⁹²

Where no consideration is expressed in the deed, and there is no proof of any, the deed is left without any con-

89—Rohde v. Rohn, 232 Ill. 180.

91—Clark v. Harper, 215 Ill. 24.

90—Blackman v. Preston, 123 Ill.

92—Redmond v. Cass, 226 Ill. 120.

sideration, and where the deed is one of ordinary bargain and sale, such a deed requires a valuable consideration to support it. The use of the word "dollars" is no ground for contending that it was used to express a consideration. Such a deed is insufficient as a foundation for a party to claim title to the tract of land mentioned in it.⁹³

In order to affect a third person, by showing that the date and consideration are different than those expressed in the deed, there should be clear proof that he had knowledge of such extraneous facts, before he can be affected by them.⁹⁴

While courts of equity do not sit to enforce mere moral rules, yet it is a part of their mission to see that common honesty, good faith and fair dealing shall be observed in the ordinary transactions in the business affairs of life.

Where a party in procuring a conveyance of valuable property to be made to himself without any consideration, knows that the fee of the same is in the grantors, and also knows they are ignorant of such fact, and he fails to inform them of their rights and they convey to him from mere kindness, under the belief that the title is already in him, a court of equity will set the conveyance aside, when the rights of innocent parties have not intervened.⁹⁵

Where several parties join in a deed for a common purpose, as the creation of a trust for benevolent purposes, it is fair to assume that each of the grantors joined in the conveyance of his property, for the uses and purposes therein set forth, in consideration of the execution of the deed by the other parties.⁹⁶

§ 1290. Good, Valuable and Sufficient Consideration—Money or the exchange of property, if otherwise sufficient, is a good consideration to support a deed. So is natural love and affection. It is natural and proper that a father

93—Catlin Coal Co. v. Lloyd, 180 Ill. 398.

94—Curtis v. Root, 28 Ill. 367.

95—McCormick v. Miller, 102 Ill. 208.

96—Sellers v. Rike, 272 Ill. 303.

should provide for his children, although they may be of age. It is what the parental feelings of good men prompt them to do; it is what just men commend and the law tolerates.

In the case of a gift from a child to a parent undue influence may be inferred from the relation itself, but never where the gift is from the parent to the child.⁹⁷

Marriage is a sufficient consideration for the conveyance to a trustee in trust for the wife during her life, with a remainder to her children, and reserving a life estate in the husband, if he survives the wife. And in such case, if the title passes to the trustee for the benefit of the wife, it passes for all the purposes of the deed, including the remainder to the children of the wife.⁹⁸

The release of his expectancy as an heir in a conveyance by a father to a son, if there be no other, is a sufficient consideration for the conveyance and for the covenants of warranty contained in the deed, and they are therefore enforceable.¹

§ 1291. Inadequacy of Consideration—While inadequacy of consideration is not, of itself, a ground for relief, it is nevertheless a circumstance to be considered in determining the good faith of the purchaser. But it cannot always be said that because the purchaser bought the property at a grossly inadequate price he is chargeable with knowledge of a prior unrecorded deed. To so hold would be to authorize the setting aside of every title obtained at a grossly inadequate price, which the law will not permit.²

Although the consideration for a quitclaim deed is small, that does not raise the presumption that the grantee knew that the grantors had previously conveyed the property, especially where there is an outstanding tax deed with the holders thereof in possession.³

97—*Oliphant v. Liversage*, 142 Ill. 160; *Spencer v. Razor*, 251 Ill. 278.

98—*Chilvers v. Race*, 196 Ill. 71.

1—*Longshore v. Longshore*, 200 Ill. 470.

2—*Booker v. Booker*, 208 Ill. 529.

3—*Barton v. Mayers*, 183 Ill. 360.

Where the consideration paid is small in comparison to the real value of the property, and where the circumstances of the case are extremely unfavorable to the fairness of the transaction, though not sufficient to establish absolute fraud, the conveyance will be regarded as voluntary to the extent of the difference between the actual consideration and the real value of the property, and, to that extent, will be treated as fraudulent and void as to existing creditors.

And where the land cannot be reached, the court will seize hold of the money which the sale of the land has realized. The fund stands in place of the land, and the lien, which would have attached to the land but for its transfer, will be permitted to attach to the fund produced by the transfer.⁴

Where the allegation is bad faith on the part of the grantee and the want of consideration, the burden of proof is upon the party making the allegation.⁵

§ 1292. Bona Fides of Purchaser Where Consideration for Deed Is a Pre-existing Debt Due from Grantor—The weight of the authorities seems to be that a conveyance in consideration of a pre-existing debt does not make the grantee a bona fide purchaser for value. It is said: "A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a bona fide purchaser, since the creditor parts with no value, surrenders no right and places himself in no worse legal position than before. The rule has been settled, therefore, in very many of the States, that such a transfer is not made upon a valuable consideration, within the meaning of the doctrine of bona fide purchaser."⁶

In order to constitute a bona fide purchaser he must part with something valuable at the time, or in some way place himself in a worse condition than he was before. It

4—Snyder v. Partridge, 138 Ill. 173.

6—2 Pomeroy's Equity Jurisdiction, Sec. 749.

5—Lowden v. Wilson, 233 Ill. 340.

is not sufficient that he took the property in consideration of a pre-existing debt.⁷

And it would seem that there is no material difference between a deed the consideration for which is an antecedent debt, and a deed made on a sale under an execution issued on a judgment rendered prior to the time the judgment debtor acquired title to the property by fraud and circumvention. In such a case the judgment creditor stands in no better position than the judgment debtor, and a deed thus obtained may be set aside by the grantor thereof, in equity; in such case the judgment creditor parts with nothing, and he is not in the position of a bona fide purchaser for value.⁸

§ 1293. Proof of Consideration—The consideration named in the deed is prima facie evidence of the amount paid for the land. But as between grantor and grantee, the recital in the deed is not conclusive evidence of the consideration paid. The actual consideration which passed between the parties may be shown by parol testimony to be different from the consideration recited in the conveyance.⁹

So an instrument executed by the plaintiff in a suit is prima facie proof that he received the price named therein, for the land, at the time of the conveyance.¹⁰

A warranty deed which fully states a consideration, the recital thereof cannot be contradicted by parol proof for the purpose of making the deed null and void. In actions for breaches of covenants and the like, where the evidence is not offered to vary the legal import of the deed or impair its effect as a conveyance, proof of the actual consideration may be made.¹¹

7—Powell v. Jeffries, 4 Scam, 387;
Metropolitan Bank v. Godfrey, 23 Ill.
531.

8—Sparrow v. Wilcox, 272 Ill. 632.

9—Howell v. Moores, 127 Ill. 67.

10—Sanitary District v. Pearce,
110 Ill. App. 592.

11—Redmond v. Cass, 226 Ill. 120;
Russell v. Robbins, 247 Ill. 510;
Weber v. Chicago & W. I. R. R. Co.,
246 Ill. 464.

Parol evidence may be introduced to show the true consideration of a deed, although it may be different from that expressed in the instrument.¹²

In actions for the breach of covenants and the like, where the evidence is not offered to vary the legal import of the deed nor impair its effect as a conveyance, proof of the actual consideration may be made.¹³

§ 1294. Failure of Consideration—Conveyance by Grantor in Consideration of Support—The doctrine is established in this State that where one voluntarily conveys all his property in consideration of his support and maintenance during his life, and the grantee afterwards refuses to perform his contract, a court of equity will be justified in presuming a fraudulent intention in the first instance in entering into it and will grant relief by the rescission of the contract and cancelling the deed.¹⁴

Where a deed is given by a parent to a child in consideration of future support, care and nursing to be rendered by the child in the declining years of the grantor's life, and there is a breach of such condition, the courts may presume that the contract was made in the first instance with the fraudulent intent of not performing it, and the deed may be avoided and the property reclaimed for the purpose of obtaining that which was agreed to be given by the grantee. Such a deed is effectual to transfer the title and is voidable merely at the instance of the grantor, who may file a bill in equity to have it set aside on the ground of the abandonment of the contract and the presumed fraudulent intent in entering into it. The right to have it set aside is a mere personal right or privilege, and the bare right to file a bill in equity, growing out of a perpetration of a fraud on a party, is not assignable.

12—*Worrell v. Forsyth*, 141 Ill. 22;
Leonard v. Springer, 197 Ill. 532;
Merriman v. Schmidt, 211 Ill. 263.

13—*Redmond v. Cass*, 226 Ill. 120.

14—*DeCosta v. Bischer*, 287 Ill.
598; *Di Rosa v. Sammarco*, 278 Ill.
46; *Chamberlin v. Sanders*, 268 Ill.
41.

The case of *McClelland v. McClelland*, 176 Ill. 83, is not at variance with the foregoing proposition. In that case Mary McClelland was the owner of the farm and homestead, and she and Mason McClelland, her husband, conveyed the property to their son in consideration of his furnishing them with a comfortable home and support during the remainder of their lives. There was a breach of the contract, and Mary McClelland, during her life time, filed a bill to set aside the conveyance. While the suit was pending she died leaving a will, by which she devised her estate to her husband, and upon her death being suggested he was substituted as devisee and executor by virtue of the statute. At the time of the execution of the deed to the son, the surviving husband had an interest in the property by way of homestead and dower, and it was held that he had such an interest in the property as would enable him to maintain the bill.¹⁵

So where a grantor conveyed all his property to the grantee upon the condition that the grantee should support and take care of the grantor and his wife during their lives, but the grantee failed to perform his obligation, but greatly maltreated the grantor and his wife, the grantor may proceed in chancery to have the conveyance set aside. It may be that the case made by the bill might entitle the complainant to a decree for specific performance, but the personal amenity of the grantee to the grantor and his wife, and the social kindness indispensable to their happiness, cannot be enforced by a decree of specific performance. In such a case where the grantee refuses to perform his contract he cannot be permitted to retain the title conveyed to him upon the faith of such an agreement.¹⁶

If the grantee has paid an indebtedness of the grantor he is entitled to have the same refunded to him, although

15—*Berry v. Heiser*, 271 Ill. 264.

16—*Frazier v. Miller*, 16 Ill. 48;
Cooper v. Gum, 152 Ill. 471.

there may not be any evidence that the grantor authorized the payment, and the grantee is entitled to a lien on the premises for the balance due him therefor.¹⁷

The want of title in the vendor may be set up, under our statute, as a want or failure of consideration for a note sued on given as part of the purchase price of land. Neither the title bond nor the covenant of title is considered the true consideration, but the true consideration is the estate which was covenanted to be conveyed.¹⁸

§ 1295. Fraudulent Statement of Consideration—The owner of a worthless leasehold conveyed the same to a grantee, his brother-in-law, who was in his confidence, for the expressed consideration of \$100,000, but for which in fact no consideration was paid. The grantee conveyed the same to a third party for the same expressed consideration, and induced him to execute a series of notes, eleven for \$500—\$5,500, ten for \$750—\$7,500, and sixty for \$1,000 each—\$60,000, making a total of \$73,000, and to secure the payment of the notes by a trust deed on the premises. For his services in this regard the second grantee was paid the sum of \$500. All the parties to this transaction, except the original holder of the leasehold, were financially irresponsible. The notes were made payable to the order of the maker, by him endorsed, and in that condition were placed on the money market. A woman purchased four of the \$1,000 notes, upon the supposition that their payment was secured by the trust deed on the fee of the land, and that the expressed consideration of \$100,000 in the deeds justified her in so believing.

Upon ascertaining that the security was worthless she sued the original holder of the leasehold for fraud practiced upon her; he filed a demurrer to the declaration, which the trial court sustained, and she appealed to the supreme court.

17—O'Farrell v. O'Farrell, 276 Ill. 133.

18—Weiss v. Binnian, 178 Ill. 241.

In this regard the supreme court says: The consideration of \$100,000, stated in the deeds (which would usually tend to indicate the value of the property), is alleged to be false, but counsel say it is a well established rule that the purchaser cannot maintain an action against the vendor for false statements in regard to the value of property purchased, or its good quality, or the price he has been offered for it. It is true that the general rule is, that statements as to the value of a business or of real or personal property, made for the purpose of inducing another to buy or to invest money, may be, and generally are, treated as mere expressions of opinion, and if so intended and understood will not constitute fraud, in the absence of any misrepresentation of material, extrinsic facts or concealment of such facts. The reason for the rule is, that such statements are expressions of opinion; but where they are made with the intention that they shall be understood as statements of facts, and not as expressions of opinion, they will constitute fraud. It is only because statements of value can rarely be supposed to have induced the purchaser without negligence, that the authorities have laid down the principle that they cannot usually avoid a bargain. Here the consideration for the conveyance from the appellee to his brother-in-law was stated to be \$100,000, the conveyance from the latter to the maker of the notes was stated to be \$100,000, and the deed of trust purported to secure the payment of \$73,000,—and these were the three things alleged to have been done in pursuance of a design to cheat and defraud the plaintiff and others. It cannot be denied that the consideration stated in the two deeds and trust deed was calculated to lead any one to believe that the property mentioned therein was, to say the least, of greater value than it really was; neither can it be said that the statements made in the deeds, and especially that in the trust deed, are mere expressions of opinion, which should not have been relied upon by persons examining the record. It

cannot be laid down as a matter of law that the value is never a matter of fact, and we think the circumstances of this case illustrate the propriety of this rule. They show a plain and aggravated case of cheating, and it would be a deserved reproach to the law if it exempted any specific fraud from a remedial action where a fact is stated and relied upon, whatever may be the general difficulty of defrauding by means of it. The rule relied upon by the appellee does not apply to the facts in this case. The statements of value in said deeds, as alleged in the declaration, having been made in pursuance of a scheme on the part of the defendant, constitute fraud and deceit.

The counsel further contends that there is no allegation that the defendant ever knew the plaintiff ever made any representations of any sort to her. It is true, the representations were not made by means of conversations between the parties; but the rule is stated that a representation is anything short of a warranty, proceeding from the action or conduct of the party charged, which is sufficient to create in the mind a distinct impression of fact, conducive of action. The usual and ordinary example is an oral, written or printed statement. But a statement is by no means necessary. Any conduct capable of being turned into a statement of fact is a representation. There is a distinction between misrepresentations effected by words and misrepresentations effected by other acts. It is sufficient that there were acts such as to mislead a reasonably cautious man to regard the expression of a fact forming a basis of, or contributing an inducement to some change of position by him. In this case, the recitals in the deeds and trust deed, stating a consideration which inferred that the property was of great value, whereas the interest of the defendant therein was of no value whatever; especially is the statement of Miller (the second grantee) more misleading and deceptive. It amounted to a statement that the notes were originally given by him as a part only of

the purchase price of the property. Accepting as true the allegations of the declaration, as we must on this general demurrer, the scheme was an artful one, calculated to lead an innocent third party to believe that the property was ample security for a much larger sum of money than that invested by the plaintiff. Moreover, if the appellee concocted a scheme for placing fraudulent and worthless securities upon the market, he cannot be heard to say that parties induced to buy them shall suffer for their failure or neglect to discover his fraud. The rule is, that a party guilty of fraudulent conduct whereby he induces another to act, will not be allowed to impute negligence to the latter as against his own deliberate fraud. Even where parties are dealing at arm's length, if one of them makes to the other a positive statement, upon which the other acts (with knowledge of the party making the statement) in confidence of its truth, and such statement is known to be false by the party making it, such statement is fraudulent, and from it the party guilty of fraud can take no benefit.

Counsel say there is no allegation that the defendant ever obtained any portion of the plaintiff's money, and he assumes he is not, therefore, liable in damages to the plaintiff. It is not necessary, in an action of this kind, to show that the defendant had any interest in the subject matter, or that he received any benefit therefrom. He is liable, not upon the idea of benefit to himself, but because of his wrongful act and consequent injury to others.

The judgment of the trial court was reversed.¹⁹

§ 1296. Party Entitled to Consideration in Condemnation Proceeding—A conveyance by one having title when a judgment of condemnation is entered, and before possession is taken or payment made in the condemnation proceeding, passes the property subject to the right of the petitioner for condemnation to acquire the same upon the payment

¹⁹—Leonard v. Springer, 197 Ill. 532.

of the amount of the judgment. And it is true as a general thing, that the grantee of the person holding title when the judgment of condemnation is entered, is entitled to the compensation when the compensation is paid. In other words, the one who is entitled to receive the award for damages is the person who is owner when possession is taken or the payment of damages is made.²⁰

But where, on a sale by a conservator, the damages awarded in a condemnation proceeding for the taking of a part of the land to be sold, are expressly reserved by the conservator of such damages to be paid to him, the above rule does not apply.²¹

§ 1297. **Voluntary Settlements**—Courts of equity are strongly inclined to uphold deed of voluntary settlements to persons having natural claims upon the grantor and will do so unless compelled to an opposite conclusion by strong and convincing evidence. Such courts do not attach much importance to the mere manual possession of the deed as they do to the intention of the grantor, as gathered from the whole evidence in regard to the vesting of the title. If the intention of the grantor to pass the title presently to the grantee is satisfactorily made out by the proofs, courts of equity have usually sustained such transfers, even in cases where the manual possession of the deed remained with the grantor.²²

Such settlements fairly made are binding on the grantor, unless there be clear and decisive proof that he never parted or intended to part with the possession of the deed.²³

The books furnish many cases where deeds and bonds not being valid at law have been sustained in equity. Courts of equity will sustain a contract void at law; and a deed from a husband to his wife, although the same may be void at law, will be sustained in equity, when it appears

20—Chandler v. Morey, 195 Ill. 596; Price v. Engelking, 58 Ill. App. 547; Rice v. Chicago, 57 Ill. App. 558.

21—Chandler v. Morey, 195 Ill. 596.
22—Vaughn v. Vaughn, 272 Ill. 11.
23—Shults v. Shults, 159 Ill. 654.

from the circumstances and nature of the gift or grant, whether it be expressed or implied, that they are such as to afford no ground to suspect fraud, and the same amounts only to a reasonable provision for wife.²⁴

The law has regard for the relationship of the parties and the motives that are presumed to dictate such conveyances and the degree of confidence which the parties, standing in such relation, as donors and donees of valuable property, are presumed to have, and in such cases the presumption of the law is there was a delivery, and when brought in question the burden is upon the grantor, or those claiming adversely to the donee or beneficiary, to show clearly that there was no delivery.

When the owner of property in good faith makes a voluntary conveyance of it to those who would naturally have a claim upon his bounty, courts of equity are strongly inclined to uphold the conveyance, and will do so unless impelled to the opposite conclusion by strong and convincing evidence. There is in such cases a high degree of mutual confidence sustained between the parties. It often happens that the beneficiary, because of tender years and want of discretion, is unable to comprehend and protect his own interest. In view of these considerations courts of equity do not attach so much importance to the mere manual possession of the deed as they do to the intent of the grantor, as gathered from the whole evidence, in regard to the vesting of title. If the intention of the grantor to pass the title presently to the grantee is satisfactorily made out by the proofs, courts of equity have usually sustained such conveyances even in cases where the manual possession of the deed remained with the grantor. This is the well settled law in this State.²⁵

Where a man pays for land and causes it to be conveyed to this wife or child the presumption is that it was intended as a gift. But the reasons for so holding do not apply,

24—Dale v. Lincoln, 62 Ill. 22.

25—White v. Willard, 232 Ill. 464.

however, where the wife pays for the land and it is conveyed to her husband.²⁶

The right of a party to settle real estate upon his wife and children, when existing creditors are not affected thereby, is undoubted; but no one is allowed, under the guise of settling property upon his wife and children, to perpetrate a fraud upon others. He may not be allowed to retain the actual possession of real estate, and, by claiming title in himself, obtain credit, and afterwards say he had conveyed it to his wife and children, and that it should not, therefore, be subject to the payment of his debts.²⁷

Where an insured assigns the policy on its back, to a trustee for the use and benefit of his two minor children, and the assignment is agreed to by in the insurance company, and the insured notifies the trustee of the assignment, and he accepts the trust, in a suit in equity by the trustee against the administrator to recover the money paid him by the insurance company, it was held that although the insured retained possession of the policy and the assignment, that the actual delivery of the policy and assignment to the trustee was not necessary in order to complete the trust created; that the acts of the parties, the insured notifying the trustee of the assignment and trust, and the written acceptance thereof by the trustee, constituted a sufficient delivery to complete the title in the trustee.

The object sought to be accomplished by the assignor in making the assignment, to make provision for his orphan children, being fully established, equity will carry out such intention, though the transfer be voluntary and without consideration, he never having manifested any desire to retract the act. In such case, equity will look to the substance of the thing done, and the intention with which it

26—*Baughman v. Baughman*, 283 Ill. 55. Citing *Wright v. Wright*, 242 Ill. 71; *Ross v. Hendrix*, 110 N. C. 403.

27—*Blackman v. Preston*, 123 Ill. 381.

was done, and in the absence of fraud, will carry out such intention, and give it full effect.²⁸

The law is well settled that a parent, who is not indebted, may make a settlement of property on a child, where the settlement is reasonable, considering the grantor's circumstances, and a subsequent creditor of the grantor cannot complain, unless the conveyance was made with a view of contracting future fraudulent indebtedness.²⁹

A father conveyed to his three daughters a certain piece of land. The conveyance was voluntary, the principal consideration being love and affection. About three years thereafter the father went into bankruptcy, and it was claimed that the conveyance to his daughters was fraudulent and void as to his creditors. But the court said that the claim of the creditor was not in existence at the time of the conveyance, nor were any of the debts owed by him at the time of his bankruptcy. At the time of the conveyance he was entirely solvent, and had the legal right to convey his property to his daughters. If he was then solvent no one had the right to question the transaction. If he was solvent, his daughters took the conveyance free from all claims that subsequently accrued against the father.³¹

A voluntary conveyance made while the donor is in embarrassed financial circumstances, is fraudulent as to pre-existing creditors, even though the donor retains enough property in value equal to, or more than equal to, his indebtedness when the event shows that the property retained is not sufficient to discharge all his liabilities. What may be in the mind of the grantor when he conveys the property is immaterial. The conveyance being voluntary, if it results in hindering, delaying or defrauding his creditors, it must be regarded as fraudulent in law. The law will not speculate as to what is actually passing in the mind of the debtor, for the act itself may not be immoral or corrupt.

28—*Otis v. Beckwith*, 49 Ill. 121.

31—*Davis v. Kennedy*, 105 Ill. 300.

29—*Higgins v. White*, 118 Ill. 619.

The law does not deal with the conscience of the debtor. He may make a conveyance with the most upright intentions, really believing that he has a right to do so, and that it is his right and duty to do it. Yet, if the transfer is voluntary, and hinders, delays or defrauds his creditors it is fraudulent.²⁸

§ 1298. Property Which Must Be Conveyed by Deed—

The distinction which early prevailed in England between conveyances by livery of seizin and by deed is abolished in this State, so that now a deed is necessary in order to convey a freehold interest in, to, or out of any messuage, lands, tenements or hereditaments. And rents, services, and such like things which are in gross, and not incident to some other thing, can only be granted by deed. Remainders and reversions in fee, or for life, are grantable only by deed, and can only be so surrendered. Every easement or servitude in lands, being an interest therein, can only be acquired by grant, or what is deemed to be evidence of an original grant. Any interest in lands which exists by possession, reversion, remainder, executory devise, or contingent remainder, can only be transferred or acquired by deed.

But every right is not the subject of grant, though it relates to lands, or an interest therein. Thus, a bare possibility of an interest which is uncertain, is not grantable, though a possibility, coupled with a present interest, may be granted. So it has been held that a grant by an heir apparent of his interest in his ancestor's estate, so long as his ancestor is living, conveys nothing, and is inoperative.²⁹

§ 1299. Property Capable of Being Conveyed—Hereditaments are things capable of being inherited, be they corporeal or incorporeal, real, personal or mixed, and including not only lands and every thing thereon, but also heir-

²⁸—*Marmon v. Harwood*, 124 Ill. 104.

²⁹—2 Wash. on Real Prop. 597-9.

looms, and certain furniture which, by custom, may descend to the heir together with the land.³³

And such property may be conveyed.

A ferry franchise, being an incorporeal hereditament, is real estate, and can be transferred only in accordance with the statute relating to the conveyance of real estate.³⁴

Where a party has only an expectancy in lands, he has nothing to convey, and his deed conveys nothing.³⁵

But an expectancy of a bequest to be paid out of lands to be sold, although not an interest in the lands, is still a property right which can be assigned or contracted to be sold and the quitclaim deed of the legatee, though purporting to be of an interest in the land, if intended by the parties to be an assignment of that property right, would in equity operate as such.³⁶

§ 1300. **Fixtures** are personal chattels affixed to the real estate, which may be severed and removed by the party who has affixed them. But the general rule is, that fixtures once annexed to the freehold become part of the realty; there are, however, many exceptions to this general rule.³⁷

Fixtures are such articles of personal property as are deemed personal, in contradistinction to real, but from their attachment to or connection with the land, or rights of inheritance, or such parts of the land or realty which, being partly severed, have not changed their character for want of complete severance in fact, or by contract, and so as, in either case, to change their character. But in its application the definition of a fixture, great difficulty and confusion of ideas is induced by many distinctions introduced in favor of the interest of particular owners, or to promote the public good in the use made of particular prop-

33—2 Black. Com. 17.

34—Dundy v. Chambers, 23 Ill. 369.

35—Casseem v. Kennedy, 147 Ill.

660.

36—Shepherd v. Clark, 38 Ill. App.

66.

37—Bouvier Law Dic.

erty. Thus, a vendee might take it where an heir might lose it; an heir might take it when a landlord could not. Attachments of personal property to real estate for the purposes of trade, may be removed, which when made merely for the enjoyment of the property, might not. Things attached by the owner of the inheritance are distinguished by that fact, from things annexed by the lessee. Things essential to the use and enjoyment of the inheritance, are thereby more strongly impressed with the character of fixtures than others not essential to it, and which may be removed without detriment to it, or its full enjoyment.

And after giving the term its most extended definition, it will not be possible to include therein hewed timbers, posts and round logs, lying loosely around the land, although originally provided and intended for a granary on the land. The subject, however, may be considered full of difficulty, and its application must depend greatly on the peculiar circumstances of each individual case.³⁸

A mill and buildings and machinery may all form part of a leasehold estate, and are chattels real, and are proper subjects of a real estate mortgage, which, when made, creates valid lien upon the property. Steam engines and boilers, and all the engines and frames adapted or used to be moved by the steam engine, by means of connecting wheels, bands or other gearing, are fixtures or in the nature of fixtures and constitute a part of the realty, and pass by a mortgage.³⁹

There is a line of cases which seem to conflict with the principles laid down in the case of *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, among which is the case of *Sword v. Low*, 122 Ill. 487, a well considered case. In it the following principles are announced :

38—*Cook v. Whiting*, 16 Ill. 480.

39—*Fifield v. Farmers' Nat. Bank*,
148 Ill. 163.

There are three tests as to the character of fixtures, as to their being irremovable. First, actual annexation to the realty; second, application to the use or purpose to which that part of the realty with which they are connected is appropriated; and, third, the intention of the parties making the annexation to make a permanent accession to the freehold. The latter test appears to be the principal one.

While parties may not, by contract, make personal property real or personal at will, yet where an article personal in its nature is so attached to realty that it can be removed without material injury to it or to the realty, the intention with which it is attached will govern; and if there is an express agreement that it shall remain personalty, or if, from the attendant circumstances, it is evident or may be presumed that such was the intention of the parties, such articles will be held to have retained their personal character, even against subsequent purchasers and incumbrancers.

The rule that the intention with which the annexation is made will control as to the personal character of the article does not apply to such articles as enter into the structure appurtenant to the land, such as lumber, stone, shingles, doors, windows and such articles which are incorporated in the structure. These and like articles lose their identity and become a necessary part of the structure, and are clearly distinguishable from such articles as are or may be merely annexed to the freehold, and retain their characteristics, and may be removed without material injury to them.

While it may be conceded that portable mills, engines, boilers and the like, even when slightly annexed to the freehold, will, in the absence of circumstances raising a contrary presumption, or evidence showing a contrary intention, be considered to have been attached as permanent accessions to the realty, yet, however permanently attached, if removable without material injury, the intention

to be inferred from the circumstances, and the relation of the parties to each other and to the realty, or as shown by the evidence, will be of controlling and decisive importance.

Where it is agreed, on the sale of a steam boiler and engine, that the vendor is to have a lien thereon, by chattel mortgage, until the price is paid, and the purchaser gives a chattel mortgage on the same for the price thereof, and afterwards the purchaser sets the same up on a lot purchased by him, he renews the chattel mortgage, in which he treats the property as chattel property, it will not become part of the realty, if it may be removed without material injury to it or the realty.

Under the laws of this State, chattel mortgages are required to be filed and recorded in the Recorder's Office of the county; and they, from the date of their filing, are notice to all subsequent purchasers and incumbrancers, of the rights of the mortgagee thereunder in the property mortgaged, although it may be attached to the real estate.⁴⁰

A mill, with its buildings and machinery, erected upon leased lands, cannot be regarded otherwise than as fixtures and as a part of the realty, and although it might be possible for the tenant to remove them they constitute a part of the freehold until they are severed therefrom. They with the lease were chattels real, and are proper subjects of a real estate mortgage.

No doubt the parties could agree among themselves that they would treat the engine and other fixtures as personalty, but their private agreement would not change the character of the property so far as third parties were concerned.^{40a}

§ 1301. Appurtenances—Whatever is in fact appurtenant to property passes with the deed, although the words "with the appurtenances" be not embodied in the deed. These

40—*Sword v. Low*, 122 Ill. 487.

40a—*First Nat. Bank v. Adam*, 138 Ill. 483.

words will not enlarge the scope of the deed, and an easement appurtenant to the lands will pass by its conveyance.⁴¹

Where a grant is made for a valuable consideration it is presumed that the grantor intended to convey and the grantee expected to receive the full benefit of it, and therefore the grantor conveyed not only the thing specifically described, but all other things, so far as it was within his power to pass them, which were necessary to the enjoyment of the thing granted.⁴²

It does not necessarily follow that structures or buildings placed by one person upon the lands of another, become a part of the real estate. So a house erected upon the land of another under an agreement that it shall belong to the builder, is personal property.

If, however, a person enters upon the land of another without permission, and places a building or other structure thereon, permanently attached to the soil, he will be a trespasser, and the building or structure will become a part and parcel of the land, and will be the property of the land owner. In such cases the trespasser acquires no right by his tortuous act.⁴³

§ 1302. Growing Crops—Crops produced by annual planting and cultivation are in some instances deemed real estate and in others personalty, depending largely upon the character and capacity in which the contracting parties claim them. Where the parties occupy the position of vendor and vendee the rule is well established in Illinois that growing crops unsevered from the soil are real estate and pass to the vendee by deed, unless reserved in the deed. Reservation by a verbal agreement entered into prior to the execution of the deed is not binding and evidence thereof is inadmissible. Matured crops if severed

41—*Shelby v. Chicago & E. I. R. Co.*, 143 Ill. 385.

43—*Chicago & Alton R. R. Co. v. Goodwin*, 111 Ill. 273.

42—*Threlkeld v. Inglett*, 289 Ill. 90.

from the soil become personal property and do not pass with the deed, but crops not severed, whether ripe or unripe pass to the vendee by the deed as being annexed and forming part of the freehold.⁴⁴

A parol reservation of a growing crop on the land conveyed is not valid and binding; but while this may be true, yet a license by parol may be given to remove the crop from the land owned by the licensor, and where the license is revoked, the right of revocation ceases when the crop is severed from the soil, and the title to the crop will vest in the party acting under the license.⁴⁵

§ 1303. Future Interest Granted—A deed by which the grantor remises, releases and quit claims to the grantee the premises described therein, after the death of the grantor, is simply a present grant of a future interest in the lands, and is permissible.⁴⁶

Under the decisions in this State a conveyance can be made not to take effect until the death of the grantor and such a deed will not be held to be in the nature of a testamentary devise.⁴⁷

Where a deed has been actually delivered to the grantee in the lifetime of the grantor, even though it contains a provision that it shall not take effect until the death of the grantor, it will be sustained as a present grant of a future interest.⁴⁸

The delivery of a deed in the grantor's lifetime changes the effect of an instrument which might, but for the delivery, be of a testamentary character.⁴⁹

To hold otherwise would be equivalent to holding that the grantor intended that his act in executing and delivering the deed was a nullity. Such a conclusion the law does not

44—*Damery v. Ferguson*, 48 Ill. App. 224. 616; *Harshberger v. Carroll*, 163 Ill. 636.

45—*Carter v. Wingard*, 47 Ill. App. 296. 48—*Hathaway v. Cook*, 258 Ill. 92.

46—*Bowler v. Bowler*, 176 Ill. 541. 49—*Potter v. Barrenger*, 236 Ill. 224.

47—*Shackelton v. Seabee*, 86 Ill. .

favor and will not permit if it can be avoided without violence to the established rules of law.⁵⁰

Although the words in a deed may be considered inapt, but where, taking the whole instrument together, it is shown that the grantor intended to reserve a life interest in himself and convey the remainder to the grantee the deed will be sustained. Very frequently words are used not in their technical or literal sense, and when the other parts of the instrument indicate a different intention, such an intention may be gathered from the whole instrument and surrounding circumstances.⁵¹

§ 1304. Equitable Titles Subjects of Conveyance—An equitable title to land is as much a subject of conveyance as a legal title, and a written assignment of an interest in land, founded upon a valuable consideration, is just as available for the purpose of passing to the assignee the equitable title to the land as an instrument under seal.⁵²

It may be remarked here that in a bill in chancery, an equitable title is all that is necessary to support an allegation of title. If the complainant holds an equitable title he will be treated as the owner of the fee in a court of chancery.⁵³

§ 1305. Equitable Estates Only Extinguished by Technical Conveyance—Where the original transaction between the parties has not been in the form of a mortgage, but an absolute deed, with a bond to reconvey on the payment of money at a specified time, the right of redemption cannot be extinguished, except by an instrument which will operate as a technical conveyance of the mortgagor's estate in the land. He undoubtedly has an estate, which will pass by descent, or devise, or by deed.

But, nevertheless, it is a purely equitable estate, that is

50—*Bowler v. Bowler*, 176 Ill. 541.

52—*Barrett v. Hinckley*, 124 Ill. 32.

51—*Phillips v. Gannon*, 246 Ill. 98;

53—*Hemstreet v. Burdick*, 90 Ill.

Nowakowski v. Sombeziak, 270 Ill. 444.

622.

to say, an interest in the land based upon equitable grounds, and which a court of chancery will protect and enforce when equitable considerations demand. But he has nothing more. The legal title has gone to his grantee by means of a deed absolute upon its face. If the deed is made to secure a loan of money, and a bond, or contract to reconvey is taken, the transaction, in a court of equity, is regarded only as a mortgage. But the naked legal title is vested in the grantee, and, if such transactions subsequently occur between the parties as would render it inequitable that the grantor should be permitted to redeem, a court of equity will refuse to aid him. In such an event, the equitable title is practically gone or annihilated without a release, because the equitable considerations, upon which it rested, are destroyed by the acts of the parties, and equity will leave the legal title where they have placed it.⁵⁴

§ 1306. **The Granting Clause in a Conveyance** is a part of the premises. The term grant was anciently and in strictness of usage applied to denote the conveyance of incorporeal rights, though in the largest sense the term comprehends everything that is granted or passed from one to another and is now applied to every species of property.⁵⁵

The usual form is, the maker or grantor "has granted, bargained, sold, remised, released, aliened and confirmed and by these presents do grant, bargain, sell, remise, release, convey, alien and confirm," the premises described, to the grantee.

§ 1307. **Nature of Estate Granted**—The nature of the estate granted is a part of and should be included in the premises. These natures may be of several kinds; as an estate for years, for life, in tail, in fee simple or in trust. The natures of these estates either have been or will be here-

54—Fitch v. Miller, 200 Ill. 170;
West v. Reed, 55 Ill. 242; Green v.
Capps, 142 Ill. 286.

55—Bouvier's Dic. "Grant."

after considered herein. It is only necessary to mention them here as being a material part of the deed.

Where the interest of either party in the property is expressed in writing, it will be presumed that the actual and entire interest is expressed, and oral testimony will not be received to vary the terms of the instrument, where no fraud is shown.⁵⁶

Where a partnership is formed for the purpose of buying real estate, not to hold permanently but to sell at a profit, as between partners it is regarded in equity and understood as personal estate. It is treated as assets and stock in trade of the partnership.⁵⁷

§ 1308. **The Description of the Premises** in the deed should be clear and unambiguous, so that it may be known what premises are conveyed.

Where in a contract for the sale and purchase of land the description of the premises is so indefinite that they cannot be located or ascertained, the contract is void for a lack of description, and where a contract cannot be enforced against one party it is not enforceable against the other party.⁵⁸

But any description adopted in a deed by which the premises intended to be conveyed may be established and identified is sufficient; no set form of words is required and extrinsic evidence may always be used to identify and establish the objects of the calls in the deed.⁵⁹

Where the description of the land conveyed by a deed is of doubtful construction as to its boundaries, the construction given to it by the parties themselves, as shown by their acts, is deemed to be the true construction until the contrary is shown.⁶⁰

56—Kerting v. Hatcher, 117 Ill. App. 647; Carpenter v. Plagge, 192 Ill. 82.

57—Parish v. Bainum, 291 Ill. 374.

58—Draper v. Hoops, 135 Ill. App. 388.

59—Colcord v. Alexander, 67 Ill. 581.

60—Glos v. Holmes, 228 Ill. 436.

Lands which were described as "two entire sections of land in the Marine settlement and State of Illinois, and patented to said John Rice Jones," the description was held sufficient, since the locality was well known, and, upon the examination of the proper records, it could be ascertained which two sections of land had been so patented.⁶¹

A description of the property conveyed by a deed was of certain lots in "Frye's Addition to Peoria" instead of Smith Fry's Addition, and it was held that an objection thereto was too technical, as it appeared that there was only one Frye's Addition.⁶²

So a description of the land in a deed as the "N. E. ¼, 17, 15 N. 6," was held to be sufficiently clear and certain to convey the land. All persons dealing with the land would doubtless understand it.⁶³

Where the property is fully described by a proper section, town and range it is sufficient; there is only one section in the State of Illinois answering this description, and a misrecital of the proper county will not operate to defeat the title.⁶⁴

Where a grantee, by the consent of the grantor, is permitted to take possession of premises within the general terms of the description and occupy and make permanent improvements on them, the grantor will be estopped to urge the uncertainty of the description, and a court of equity will compel the execution of a deed properly describing the land intended.⁶⁵

Where the premises in a deed refers to one of the parties to the deed as being of a certain city, in the State of Illinois, and the description of the property refers to it as being in a certain subdivision of the same city, a reference back to the residence of the party is sufficient to

61—*Choteau v. Jones*, 11 Ill. 300;
Koelling v. People, 196 Ill. 353.

62—*Langlois v. Cameron*, 201 Ill. 301.

63—*Bowen v. Prout*, 52 Ill. 354.

64—*Burns v. Curran*, 282 Ill. 476.

65—*Chicago & A. R. R. Co. v. Langer*, 288 Ill. 16. Citing *Purinton v. Northern Ill. R. R. Co.*, 46 Ill. 297.

indicate the county and State in which the premises are located.⁶⁶

The law is well settled that a conveyance of a lot abutting upon a street, in case of a common law dedication, by operation of law carries with it the fee of the land underlying the street to its center, subject, however, to the public easement; and this is true, although the conveyance describes the premises conveyed by lot and block number, unless the title to the street is expressly reserved to the grantor or specifically excluded from the grant; and the intent to exclude the street must appear from the language of the deed, as explained by surrounding circumstances.⁶⁷

The record of a deed is constructive notice only as to parties holding in the same chain of title, and a purchaser is not required to examine every record that might by some possibility affect the real estate before he can safely take a title. Where a description in a conveyance in a chain of title is erroneous and the error is apparent on the face of the instrument and of such a character as would lead a purchaser to make inquiry as to the land intended to be described, and an inquiry would lead him to a knowledge of the true condition of the title he will be held to have such knowledge. But the record of an instrument affecting the title to land is constructive notice only in so far as the land is correctly described unless it is apparent from the record that there is a misdescription.⁶⁸

Where a deed in the description of the land refers to another deed for a more perfect description it is essential that the deed referred to be introduced in evidence. If it is so introduced the description of the land therein is "read in," as it were, to the deed referring to it, the same as if embodied in the description of the land contained in the deed referring to it. If the description of the land offered

⁶⁶—*Wilder v. Aurora, D. & R. E. T. Co.*, 216 Ill. 493.

⁶⁷—*Brewster v. Cahill*, 199 Ill. 309.

⁶⁸—*Thorpe v. Helmer*, 275 Ill. 86; *Morrison v. Miles*, 270 Ill. 41.

in evidence is defective, and the deed to which reference therein is made, is not offered in evidence the uncertainty in the description remains, and such defective deed is inefficient as color of title.⁶⁹

§ 1309. Conveyances Void for Uncertainty in Description—Where the description of the premises conveyed is so uncertain and indefinite that they cannot be located the conveyance is void for that reason. So where the deed is for a certain number of acres out of a certain tract of land, without specifying the part out of which it is to be taken, the deed is void for uncertainty, because the land cannot be located.⁷⁰

§ 1310. Defective Descriptions of Exceptions Are Void—A deed which conveys lands by a correct description is not void because of an attempted exception of a quantity of land therefrom by a description which is uncertain and defective. If the attempted description of the lands proposed to be exempted is defective so as to render them incapable of designation, then the exemption is void, and nothing is exempted.⁷¹

But it had previously been held that a deed conveying a certain tract of land, "except the southeast corner," is also void for uncertainty. That the excepted tract not being ascertainable, it is of course, uncertain what remained to be conveyed.⁷²

In the *Attebery* case no reference is made to *Alleman* case.

§ 1311. Ambiguities in Descriptions—Where it appears that there is a latent ambiguity in the deed made manifest by extrinsic evidence, parol evidence may be admitted for the purpose of making an identification of the lands alienated. Parol evidence is always admissible to explain a

69—*Allmendinger v. McHie*, 189 Ill. 308.

70—*Shackleford v. Bailey*, 35 Ill. 387; *Chicago & A. R. R. Co. v. Lan-ger*, 288 Ill. 16.

71—*Attebery v. Blair*, 244 Ill. 363.

72—*Alleman v. Hammond*, 209 Ill.

70.

latent ambiguity, and show what property was intended to be conveyed by the deed.

In cases of latent ambiguity evidence is received, not for the purpose of importing into the writing an intention not expressed therein, but simply for the purpose of elucidating the meaning of the words employed; the duty of the court is to declare the meaning of what is written in the instrument.⁷³

Premises described as the "north side" of a lot means the north half of the lot; and the "east end" of a tract of land means the east half of the tract; and the "west side" of a quarter section describes the west half of the quarter section.⁷⁴

It is not necessary in a conveyance of any parcel of land that it should be called by any particular name. It is only necessary that the description should be such as to identify the property. Critical accuracy in the description is not essential. So, where in a certain block there are two lots of the same number, one in the original subdivision, and the other in a subdivision of certain lots in the block, and the record shows that a certain party is the owner of one of these lots and that he has no title whatever to the other lot, it is plain that in his deed describing his property by number of the lot no reasonable man could fail to identify the property conveyed by his deed, and such a deed is sufficient without reformation.⁷⁵

§ 1312. Two Descriptions Not Corresponding—If a deed contains two descriptions of the land conveyed, which do not coincide or agree with one another, the grantee is at liberty to elect to take by that description which is most favorable to him.⁷⁶

73—Bradish v. Yocum, 130 Ill. 386.

74—Chiniquy v. People, 78 Ill. 570; Winslow v. Cooper, 104 Ill. 235; Hill v. Blackwelder, 113 Ill. 283.

75—Bowen v. Galloway, 98 Ill. 41.

76—Sharp v. Thompson, 100 Ill. 447; Peoria & P. U. Ry. Co. v. Tamp-
lin, 156 Ill. 285; Ely v. Brown, 183
Ill. 575; Casler v. Byers, 129 Ill. 657.

§ 1313. **Descriptions by Metes and Bounds**—The law is well settled that where a deed contains two descriptions, each of which is in itself complete, one describing the land conveyed and the other by metes and bounds, in case of conflict of description the one by metes and bounds will control and that by quantity will be rejected. The quantity of land mentioned in a deed as being the number of acres conveyed must yield to the boundaries contained in the description, and if inconsistent with the actual area of the premises as thus ascertained it will be rejected.⁷⁷

§ 1314. **Discrepancy as to Quantity or Number of Acres Conveyed**—On a sale of land by its proper numbers or other specific description by which its boundaries are made certain, for a sum in gross, the boundaries, when ascertained, will control in case of a discrepancy as to the quantity or number of acres; in such case neither the purchaser nor vendor will have a remedy against the other for any excess or deficiency in the quantity stated, unless such excess or deficiency is so great as to raise the presumption of fraud.

In the absence of any fraudulent representations on the sale of a tract of land by metes and bounds, for a gross sum neither party will be bound by a statement as to the quantity or number of acres contained in the tract, except when such statement is expressly, or by necessary implication made the essence of the contract.

But if the seller warrants the tract, either expressly or by necessary implication, to contain a certain number of acres, or when the sale is by the acre, and the seller makes a misrepresentation as to the number, he will, as in any other case of a breach of a contract, be liable; and in an action by him for the purchase money, the amount of the deficit at the contract price may be recouped.⁷⁸

§ 1315. **A Shortage in Lands**, resulting from the fact that the commissioners in partition overestimated the acreage

77—Seeders v. Shaw, 200 Ill. 93.

78—Wadhams v. Swan, 109 Ill. 46.

of the tract to be partitioned, will not be allowed to fall on only one of the two tracts set off, but will be apportioned between both and the division line located accordingly.⁷⁹

§ 1316. Lands Bounded by Waters and Other Monuments

—The general doctrine that grants of land bounded by a river or their margins, above tide water, carry the exclusive right and title of the grantee to the center thread of the current, unless the terms of the grant clearly denote the intention to stop at the margin of the river, has been too long established and too firmly adhered to by the courts, to be now questioned.

But it is, however, said that this is but a presumption, for one man may own the bed of such a stream, and another may own the banks; that where, in a deed conveying land, the boundary is limited to the banks of the stream, instead of bounding it along or on the stream, the presumption must fail, and the party must be controlled by the terms of the deed. The question of intention must be settled by the language of the deed and all the attendant circumstances in evidence, and not merely by the letter in the descriptive part of the deed.⁸⁰

A conveyance of premises abutting upon a street in the case of a common law dedication, by operation of law, carried with it the fee of the land underlying the street to the center of the street, subject to the public easement; and this is true although the conveyance describes the premises conveyed by the lot or block number only, unless the title to the street is expressly reserved to the grantor or specifically excluded from the grant, and the intent to exclude the street must appear from the language of the deed, as explained by surrounding circumstances.⁸¹

79—Clayton v. Feig, 179 Ill. 534.

80—Piper v. Connelly, 108 Ill. 646; Hadden v. Shoutz, 15 Ill. 582; Rockwell v. Baldwin, 53 Ill. 19; Brooklyn v. Smith, 104 Ill. 429; Chicago v. Laffin, 49 Ill. 172; Trustees I. & M. Canal v. Haven, 10 Ill. 548.

81—Hamilton v. Chicago, B. & Q. R. R. Co., 124 Ill. 235; Thomsen v. McCormick, 136 Ill. 135; Hendersen v. Hatterman, 146 Ill. 555; Brewster v. Cahill, 199 Ill. 309.

So it was also held that a line "to a road, and thence by the road" was evidence of a grant to the center of the road, though the measurement of the distances given only extended to the side of the road.⁸²

If, however, the government surveyor establishes a monument, marking the boundary of the land between it and the bank of the river and the field notes show that a line was run between the river and such monument, then such line would form the boundary of the land.

But a meander line, which is run for the mere purpose of ascertaining the quantity of land in a fraction, cannot be regarded as a boundary line.⁸³

§ 1317. Navigable Streams Under the Common Law—While it is true the Mississippi river is a navigable stream in fact, and has so been declared and treated for years, yet it is not such a stream as is termed by the common law navigable, is beyond controversy.

At common law, only arms of the sea and streams where the tide ebbs and flows are regarded as navigable. As early as 1842, it was held that the Mississippi was not a navigable stream, under the common law definition of navigable waters, and no reason is perceived for now changing the rule announced.⁸⁴

It seems to be the well settled law of the country, that the owner of land bordering upon a river not navigable at common law, such as the Mississippi river, will be entitled to claim to the center of the current of the stream. This doctrine was settled in this State at an early day, and adhered to ever since.⁸⁵

§ 1318. Owner of Lands Bordering on Waters Entitled to Accretions—An owner of the fee, or a lessee of land, bor-

82—Piper v. Connelly, 108 Ill. 646;

Miller v. Beeler, 25 Ill. 163; Kamp-house v. Gaffner, 73 Ill. 453.

83—Houck v. Yates, 82 Ill. 179; Trustees, I. & M. Canal v. Haven, 10 Ill. 548.

84—Houck v. Yates, 82 Ill. 179.

85—Middleton v. Pritchard, 3 Scam 510; Chicago & P. R. R. Co. v. Stein, 75 Ill. 41; Cobb v. Lavelle, 89 Ill. 331.

dering on a river, not navigable under the common law, is entitled to the possession of the accretions thereto caused by the receding of the stream, or a change in its current, even though the bank of the stream is named as the boundary of the premises.⁸⁶

The grantee becomes the riparian owner and his grant extends to the center of the current, and all accretions belong to him, both by the common law and the civil law. So, if by the gradual washing away, his lands become diminished, that would be a loss incident to the purchase. And, if, on the other hand, by gradual deposits from the river, the stream recedes, he will be entitled to claim the deposits so farmed, and the boundaries of his land will be thus extended.⁸⁷

The owner of adjoining land has the title to land formed by accretions, and this is the law as to the sea where the king or State owns the bottom of the sea, or on large inland lakes, such as Lake Michigan, as well as on the navigable and non-navigable rivers, the owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss.

This right is not mainly based upon the right to the title to the submerged lands, but largely, if not chiefly, upon the right of access to the water, otherwise the owners of land by losing the right of frontage by accretions be barred of a valuable right for which there would be no adequate redress. This is a valuable right and cannot be taken from the shore owner without just compensation being made therefor.

By the common law, alluvion is the addition made to land by the washing of the sea, a navigable river or other stream, whenever the increase is so gradual that it cannot be perceived at any one moment of time.

86—Cobb v. Lavelle, 89 Ill. 331;
Rutz v. Kehn, 143 Ill. 558; Griffen
v. Johnson, 161 Ill. 377.

87—Houck v. Yates, 82 Ill. 179.

It is clear from the reasoning and conclusion of the cases that the true boundary line of lands bordering on Lake Michigan is the line where the water usually stands when unaffected by storms or other disturbing causes, and not the high water mark.

The riparian owner will not be permitted to increase his estate by himself creating an artificial condition for the purpose of effecting such an increase, and the doctrine of accretions does not apply to land reclaimed by man through filling in land once under water and making it dry.

A shore owner has no right to increase the boundaries of his premises by building out into the water for that purpose, and that the only right that he has is under the common law to access to the water and the right to natural accretions.

Lands covered by the waters of Lake Michigan belong to the State and a shore owner has no right, by any devise or scheme whatever, to extend his boundaries beyond the water's edge, and when he does so an injury is inflicted upon the rights of the State, which may be inquired into and abated by a court of equity on the application of the Attorney General.

Where, however, the accretion is due, wholly or in part, to artificial causes, not the act of the party owning the original shore land, the decisions hold, and justice would seem to require, that the same rule should prevail as to ownership of the accretions as prevails in case of accretions formed solely by natural causes.

To estop an owner of land adjoining waters from claiming the benefit of accretions thereto caused by artificial means erected or caused by third parties he must be more than a mere passive lookeron as to the erection of such artificial means which may aid in causing the accretions.⁸⁸

⁸⁸—*Brundage v. Knox*, 279 Ill. 450; *Lovington v. St. Clair Co.*, 64 Ill. 56.

§ 1319. Locating Premises Described in Document—

Where the evidence shows that the complainant located the lots in controversy by measuring with a ten-foot pole from the corner of the block in which they are located, and then fenced the same by posts and a wire fence, and there is no evidence that he did not correctly locate the lots, such evidence is sufficient to show *prima facie* the location of the premises enclosed with those described in the deed of the complainant. The location of a town lot may be fixed by witnesses from hearsay, or common repute, independent of any plat.⁸⁹

A description of land is to be determined by the court from the construction of the language used, but the actual location of the property is a question for the surveyor.⁹⁰

§ 1320. Horizontal Ownership—Where one person owns so much of a tenement as is above the ground floor, through which there is a partition wall extending from the foundation of the building to the top of the same, and another person owns the ground floor of the tenement, the former has the right to have his portion of the tenement supported by the partition wall, and the removal of such wall by the owner of the ground floor will be an infringement upon the rights of the owner of the upper floor, for which he may maintain an action for the damages sustained by him in the removal of the wall.⁹¹

§ 1321. Extrinsic Evidence Admissible to Show Lands to Be Conveyed—Where it appears from a description of the land devised, though full, certain and explicit on the face of the will, but is in fact partly false and the testator did not own the land, extrinsic evidence may be heard, not to add to or change the words of the will, but to show the situation of the testator's property, and to enable the court to apply the words to the subject matter in view of the

89—*Judson v. Glos*, 249 Ill. 82.

91—*McConnell v. Kibbe*, 33 Ill.

90—*Cicero v. Chicago, B. & Q. R.* 175.

R. Co., 270 Ill. 606.

circumstances surrounding the testator at the time of the execution of the will; and if enough remains, after striking out the false part of the description, to identify the property the testator intended to convey, his intention will be given effect.

Where a testator describes property devised by township, range, section and quarter section but does not locate it in the correct section or range, or the like, the weight of authority is that extrinsic evidence is admissible to show exactly what real estate the testator owned under this view, if he owns any real estate which corresponds, in part, to the description in the will, the court will reject the incorrect part of the description and will pass the realty conveyed by the correct description.

The court, however, has no power to reform a will, and correct a mistake therein by inserting or changing words, and where after rejecting the repugnant words, enough does not remain to leave the description which, when read in the light of the circumstances surrounding the testator at the time of the execution of the will, sufficient, without inserting words not found in the will, to identify the property which is claimed the testator intended to devise, the correction will not be made.⁹²

§ 1322. Parol Evidence Admissible to Locate Premises—The location of a town lot may be fixed by a witness from common repute, irrespective of any plat.⁹³

§ 1323. Powers of Courts of Equity to Correct Erroneous Descriptions in Conveyances—Undoubtedly a court of equity has the power to correct erroneous descriptions in conveyances where a proper case is made therefor in the pleadings, supported by proper evidence. But where the contract and the bill describe the land in an imperfect manner, and there is no averment in the bill of a mistake in the description of the land, or a prayer for its correction, a

⁹²—*Collins v. Capps*, 235 Ill. 560;
Page on Wills, Sec. 819.

⁹³—*Holbrook v. Debo*, 99 Ill. 372.

court of chancery has no power to correct the mistake by a decree to that effect. The decree must conform to the case made by the bill.⁹⁴

§ 1324. A Party May Not Take Advantage of His Own Wrong in Conveyances—So where a party by mistake conveys a tract of land which he did not intend to convey, and his grantee, in ignorance of such mistake encumbers the land conveyed by mortgage, and the original grantor, in violation of his agreement with the mortgagee, makes a conveyance of the right tract to the original grantee, and secured from him a reconveyance of the tract covered by mistake, so that the mortgagee cannot have his mortgage placed upon the proper tract of land, on which it was intended to be placed, such a grantor cannot, in a court of equity have the mortgage set aside as a cloud upon his title, where the mortgagee has acted in good faith and with proper care. The original grantor cannot escape the loss which has been caused by his own negligence in the first instance, followed by his own deliberate act of putting it in the power of the original grantee to convey the property originally intended to be conveyed to innocent parties, without notice of the rights of the mortgagee.⁹⁵

§ 1325. Reducing Granting Words to Less Than a Fee—Where the only granting words in a deed are "convey and warrant," the grantor may reduce the estate of a grantee to less than a fee simple by inserting words of limitation after the description of the premises. The rule stated in *Cover v. James*, 217 Ill. 309, is followed; and the case of *Palmer v. Cook*, 159 Ill. 300, is overruled in so far as it conflicts with the former case.⁹⁶

§ 1326. Exceptions and Reservations in Deeds—If the grantor wishes to except anything out of what he may, in general terms, have granted, it is proper that such exception should follow the description of the thing granted, and

94—2 Wash. on Real Prop. 639.

95—Yeck v. Crum, 122 Ill. 267.

96—*Bauman v. Stoller*, 235 Ill. 480;

Morton v. Babb, 251 Ill. 488.

it comes, therefore, under the head of the premises in the deed. As an *exception*, is the taking of something out of the thing granted which would otherwise pass by the deed, it may be said that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted. It must be a part of the thing included in the grant and be taken out of it; in this respect it differs from a reservation which is always some new right not *in esse* at the making of the grant. Exceptions are often made in the form of reservations where the thing, not intended to pass by the deed, is then in existence.

An exception must not be repugnant to the grant; if it is, it is void.⁹⁷

§ 1327. **Distinctions Between Exceptions and Reservations in Deeds**—It is sometimes difficult to distinguish between an exception and a reservation in a deed, and the words “reserving and excepting” are not conclusive of what is intended. The character and effect of the provision itself, in which such words occur, must determine what was intended. An *exception* in a deed withholds from its effect some part or parcel of the thing which, but for the exception, would pass, by the general description, to the grantee. A *reservation* in a deed, on the other hand, is the creation of some new right, issuing out of the thing granted, and which did not exist before as an independent right, in behalf of the grantor, and not to a stranger.⁹⁸

So a grantor may except from the conveyance specific portions of the property mentioned in the general description of the property conveyed. But he may by reservation retain the right of way over the premises conveyed by the deed.

A *reservation* should be carefully distinguished from an exception; the difference between the two things is this: by an exception the grantor withdraws from the effect of the

97—2 Wash. on Real Prop. 639; 98—Gould v. Howe, 131 Ill. 496.
Bullard v. Snedmeier, 291 Ill. 400.

grant some part of the thing itself which is *in esse*, and included in the general terms of the grant. But a reservation, though made to the grantor, lessor or the one creating the estate, is something arising out of the thing granted not then *in esse*, or some new thing created or reserved, issuing out of the thing granted, and not a part of the thing itself, nor of anything issuing out of another thing. The terms "reserve" and "reservation," however, are often used as synonymous with "except" and "exception" when the thing to be thereby secured to the grantor is a part of the granted premises, and, when thus used, they are to be construed accordingly. The term in the English books applies chiefly to rents or something in the nature of rents, but in this country the thing reserved is frequently an easement, privilege, or benefit, out of the premises granted, other than and different from the thing granted.

A reservation must be to him who made the deed and not to a stranger. And a reservation being equal to a grant there must be proper words of limitation and inheritance, if the grantor intends to secure it to himself and his heirs, or extend the enjoyment beyond his own life. A reservation must also be out of the thing granted and not another. A reservation is usually done by a clause in the *reddendum*.⁹⁹

A reservation of "the full and entire profits" of land for life does not, in any correct sense, either popular or technical, reserve any part of the estate or body of the land itself, but only the "profits" arising out of such use as may be made of the property without impairing the freehold estate. Such a reservation will not authorize the sale of the property itself or any portion of it, as timber growing upon it, and have the proceeds regarded as "profits."¹

⁹⁹—Wash. on Real Prop. 645-647.

¹—Stewart v. Wood, 48 Ill. App.

§ 1328. **The Habendum Clause** is "To Have and To Hold" the said estate to the grantee, etc. The habendum clause in a deed was formerly used to define and limit the estate taken by the grantee by the deed in the property conveyed. In modern times this office is usually performed by the granting clause, so that now the habendum has degenerated into almost a useless form, and is essential only under certain circumstances.²

The habendum clause cannot perform the office of reducing a fee simple estate to a life or less estate. So where a fee simple was devised in the devisee "and his heirs and assigns," it is not limited or reduced to a life estate by a subsequent habendum clause such as "to have and to hold the said real estate to my said wife during her life."

The habendum clause in a deed cannot perform the office of divesting the estate already vested by deed, and it is void if it be repugnant to the estate granted.

But where no estate is mentioned in the granting clause, then the habendum becomes effective to declare the intention, and it will rebut any implication which would otherwise arise from the omission in this respect in the granting clause.

So where the granting clause in a deed merely describes the property, but does not define the nature or character of the estate granted, and is not followed by any language to supply what is omitted, it results, by legal implication under the statute relating to Conveyances, that the estate conveyed is a fee; but where the habendum describes what estate is conveyed, and does not contradict the language of the granting clause, but simply supplies what is omitted therefrom, all necessity of resorting to implication to ascertain the intention of the parties is removed.³

The words in the habendum are mere words of limita-

2—Wheeler v. Wayne County, 132 Ill. 599; Lambe v. Drayton, 182 Ill. 110.

3—Riggin v. Love, 72 Ill. 553; Welch v. Welch, 183 Ill. 237; Cover v. James, 217 Ill. 309.

tion, in distinction from the words of the grant which are words of purchase.⁴

While the habendum clauses may, under certain circumstances, as where the granting clause does not mention the estate conveyed, have the effect of explaining and declaring the intent of the grantor as to what interest he intended to convey, still, when it is irreconcilable with the granting clause, the habendum clause is to be rejected. It can only affect the grant when it can be construed as consistent with the granting clause.⁵

§ 1329 Repugnancy Between Granting Clause and Habendum—Sometimes there is an apparent repugnancy between the granting part of the deed and the habendum, in respect to the estate which the grantee is to take in the property granted, which courts reconcile, if possible, so as to give effect to both. But if the language of the grant be definite in limiting the estate, and that of the habendum is clearly repugnant to the grant, the habendum yields to the grant.⁶

The office of the habendum is to limit and define the estate granted, but if there is a repugnancy between the granting clause and the habendum the former must prevail.⁷

Where an attempt is made to grant an estate as an absolute estate in fee simple the testator or grantor cannot by subsequent apt words prevent certain consequences of ownership of property attaching thereto. In a devise of land in fee simple a condition against alienation is void, because repugnant to the estate devised. A restriction, whether by way of condition or devise over or against alienation, although for a limited time of an estate in fee is likewise void, as repugnant to the estate devised to the

4—2 Wash. on Real Prop. 641-4.

6—2 Wash. on Real Estate, 612.

5—Coogan v. Jones, 278 Ill. 279;
Anderson v. Stewart, 285 Ill. 605.

7—Morton v. Babb, 251 Ill. 488.

first taker, by depriving him, during the time, of the inherent power of alienation.⁸

An instance of a repugnant, and therefore void, condition may be found in the doctrine that if there is an absolute bequest of property, with a proviso that if the legatee dies without having disposed of it by will or otherwise, his interest in it shall cease and it shall go over to another, the gift over is void and the legacy is absolute. The rule is the same both as to real and personal property. If either is given absolutely the limitation over is void. This is because the limitation over is repugnant to the nature of the estate or interest first given. And where an estate is given to a person generally, or indefinitely, with power of disposition, it carries a fee; and the only exception to this rule is, where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case the devisee will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of reversion. This distinction is carefully marked and settled by the cases.

The principle here stated is not in conflict with the case of *Burgan v. Cahill*, 55 Ill. 160, because in that case an absolute power of disposal was not given to the party to whom the property was first devised; the principle is also to be distinguished from the case of *Glover v. Condell*, 163 Ill. 566, because in that case the will conferred no power of disposition on the first taker.⁹

§ 1330. Distinction Between Deeds and Wills Regarding Repugnancy—The rule in the case of wills that where there are conflicting clauses in the will the latter clause shall prevail is reversed in the case of deeds, so that the first of two repugnant clauses in a deed shall prevail.¹⁰

8—*Jones v. Port Huron, E. & T. Co.*, 171 Ill. 502.

9—*Wilson v. Turner*, 164 Ill. 398.

10—*Morton v. Babb*, 251 Ill. 488.

§ 1331. **Conditions in Deeds**—The nature and character of estates upon condition have been heretofore considered, and it is only necessary to add here that such a clause, if it is to be inserted properly, comes next in order after the habendum.¹¹

§ 1332. **Restrictions in the Use of Property**—There are at least two methods of creating restrictions on the use of property by a purchaser. One is by express covenants contained in the deed, and the other is by the recorded plat of the subdivision upon which is noted a building line and a purchaser buys a lot with reference to the plat. The two objects of a building line restriction are to secure unobstructed light, air and vision for the lots for whose benefit the restriction is created, and to secure uniformity in the location of the buildings with respect to the street line for the accomplishment of that object. (*O'Gallagher v. Lockhart*, 263 Ill. 489.) Where the plat of a subdivision of land into blocks, lots and streets showing a building line, a purchaser of a lot according to the plat and without restrictions in the deed takes it burdened with the easement in favor of the other lots for whose benefit the building line was established and created.¹²

Where a proprietor executes and records in the recorder's office of the county an instrument in writing in which he provides among other things that no building shall be erected on any of the lots in the subdivision, for the period of twenty-five years, nearer than thirty-five feet to the front line of the lots, bay windows, porches and steps excepted, and that such restrictions should be inserted in every deed of conveyance made by the proprietor and should be considered as covenants running with the land, it is not necessary, in order to justify the interposition of a court of chancery, to prevent the violation of such a provision that the right claimed is absolutely necessary to the en-

11—2 Wash. on Real Prop. 647;
See Chapter on "The Law of Real
Estate Primarily Considered."

12—*Loomis v. Collins*, 272 Ill. 221.

joyment of the estate granted; it is sufficient if it is a benefit, and so a party assuming to violate such a restriction may be enjoined from so doing by any person holding the title to lots within the subdivision. And no part of the main building, such as swell fronts or bay windows extending from the foundations to the roof, which extend over the building line, can properly be called a porch, so as to bring it within the exception mentioned in the instrument.¹³

It is fundamental that parties seeking to enforce restrictions upon the use of property in the nature of a building line must have some right and interest in its observance by those against whom they seek to enforce it. It must have been created for their benefit, individually or in connection with others. The right or interest which will enable a party to enforce such an easement must be clear. Restrictions upon the use of property are not favored in the law, and where the right to enforce them is doubtful the doubt will be resolved against the restriction. So the restriction by a building line on some of the streets in a plat, cannot be intended for the benefit of lots fronting on other streets in the plat.

While it may be true that the designation of a building line upon a plat creates an easement for the benefit of the property fronting upon the street (*Simpson v. Mikkelsen*, 196 Ill. 575), but, like a street dedicated to the public by statutory dedication, the same may be revoked before the acceptance by the public or before property has been conveyed with reference thereto, or where a grantor in his deed modifies or limits the scope or duration of the building line restriction as shown by the plat, then the modification in the deed governs. Such deeds are contracts between the parties having effect not only to pass the title but establishing other relations and conditions.¹⁴

The owner of a certain lot conveyed the same with this

13—*Brandenberg v. Lager*, 272 Ill. 622.

14—*Loomis v. Collins*, 272 Ill. 221.

clause inserted in the deed: "This deed is granted upon the express stipulation that no building be erected upon the above described premises prior to January 1, 1898, costing less than \$2,000, the necessary outbuildings of any residence excepted. Said second party also agrees not to build within thirty feet of the north line of said premises." The grantor was the owner of all the lots fronting on the street in the same block, and a similar clause was inserted in all of the deeds of lots, executed by him, fronting on the street, and he sold all the lots. The premises so conveyed were afterwards repurchased by the grantor, and later he conveyed to another party by deed containing no reference to the building restrictions.

In a suit to enforce the conditions mentioned in the deed first executed it was contended by the defendant that the agreement in each deed was personal to the parties, and not a covenant running with the land, and while the original grantee of the deed would be bound by it, his grantee would not be. And that where the original owner again acquired title his deed thereafter executed containing no such restriction, under such circumstances the original restriction would not be binding on the second grantee.

Where there is a general plan or scheme made for the benefit of each purchaser at the time of the purchase such plan will be enforced between the grantees where lots are sold and agreement made with each purchaser as to the building line, where the agreement is intended for the common benefit of all the purchasers.

Where the intention is manifested by the character of the transaction, each party interested may enforce the restrictive agreement against each of the others.

The decision of the question as to the rights of the parties does not depend upon the question whether the restriction is a covenant running with the land; but the question is whether the party shall be permitted to use the land in a manner inconsistent with the contract entered into by the vendor and with notice of which he purchased. That the

question does not depend upon whether it is a covenant running with the land is evident in this: that if there was a mere agreement and no covenant the court would enforce it against the party purchasing with notice of it, for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.

The right to enforce this restriction upon the use of the land is based, not upon the agreement made with the subsequent purchaser, but upon the theory that each purchaser buying a lot, with notice of the general plan of improvement impliedly assents thereto and can be compelled to comply therewith at the suit of the owner of any other lot, without reference to the order in which the lots were sold. An owner has the right to sell his property upon such terms and conditions as he may think proper, and if the terms are accepted by the grantee, and are not objectionable in law, they will be enforced at the suit of one in whom the right is vested. If a subsequent owner has taken title with notice, either actual or constructive, of a binding agreement between the grantor and the original owner, establishing a building restriction he will be bound by it and equity will enforce it. A court of chancery will recognize and enforce agreements concerning real estate although such agreements are not expressed with technical accuracy, nor is it material that such stipulations should be binding at law or that there should be privity of estate between the parties in order to warrant equitable relief. Such building restrictions will be enforced in equity upon equitable principles, each case being considered upon and with reference to its own circumstances.

Parties dealing with the property are charged with notice of everything showing such restriction which may appear in any conveyance in the chain of title.

Although the property may be repurchased by the original grantor, and transferred a second time by him, without any such restriction, it is not perceived how that would

change the legal standing of the parties. The original owner when he repurchased the lots was in the same position as any other purchaser in the chain of title, and had no power in his second deed to change the effect of the original deed of conveyance containing this building restriction, executed under the general plan and with the purpose of benefiting the other lots.

Equity will not, as a rule, enforce a building restriction where by the acts of the grantor who imposed it, or of those who derived title from him, the property, and that in the vicinity, has so changed in character and environment and the use to which it may be put as to make it unfit or unprofitable if the restriction is enforced. But the character and condition of the adjoining property must have been so changed as to render the building restriction inapplicable according to the intent and spirit of the contract. But where the proof fails to show that there has been such a change as to the character of the neighborhood the complainant is not estopped from enjoining the contemplated improvement which violates the building restriction.¹⁵

Restrictions as to the power of alienation of real estate are not favored, and the policy of this State has always been to construe such restrictions with the utmost strictness, to the end that the restraint shall not extend beyond the express restriction. A power of sale will be implied where the language of the instrument shows an intention to create such a power, or where such power is necessary in order to carry out its provisions. No particular form of words is necessary to create a power of sale. Any words which show an intention to create such a power, or any form of instrument which imposes a duty upon trustees which they cannot perform without a sale will necessarily create a power of sale in the trustee.¹⁶

15—*Wiegman v. Kusel*, 270 Ill. 520.

16—*Illinois C. M. Society v. American C. M. Society*, 277 Ill. 193.

In determining whether there has been a violation of the restrictions placed upon the use of real estate the settled rule is, that if the intention of the parties to create a restriction is clearly manifested it will be enforced by a court of equity, but restrictions on the use of property owned in fee simple are not favored, and doubts will be, in general, resolved against them. A fee simple title implies an unlimited right to user, and restrictions upon the use by contract will not be enlarged or extended by construction.¹⁷

Another case, worthy of consideration, involving the construction of restrictions in deeds in regard to building lines, is that of *Hays v. St. Paul M. E. Church*, 196 Ill. 633. John A. King conveyed to the First Methodist Church certain lots fronting on Ashland Avenue, in the City of Chicago. The deed contained this provision: "Provided, however, and this conveyance is made strictly subject to the condition, that no building or structure shall be built or erected on the land herein described and conveyed, further east or nearer Ashland Avenue than is the building or house immediately south of said property." By subsequent deeds the title became vested in the St. Paul M. E. Church, but in them no reference was made to the restriction contained in the King deed.

The St. Paul church afterwards commenced a structure which violated the terms of the restriction. Nellie King Hays was the daughter of John A. King, and prior to his conveyance to the church he had conveyed the property immediately south of the church property to her, upon which was a house, occupied as a residence.

After the church commenced its structure Mrs. Hays filed a bill claiming the right to enforce the restriction contained in the King deed as being for the benefit of her house and lot, asked the court to enjoin the church from constructing or erecting on its property any building or

17—*Cochran v. Bailey*, 271 Ill. 145.

structure further east or nearer to Ashland Avenue than her house. On the hearing the bill was dismissed for want of equity. It is said in the opinion:

It was not denied that the purchase from King and the acceptance of the conveyance subject to the restriction contained in it, created a valid personal obligation to him. An owner has the right to sell and convey his property upon such terms and conditions as he may see proper, and if the terms are accepted by the grantee, and are not objectionable in law, they will be enforced at the suit of the one in whom the right is vested.¹⁸

If a subsequent owner has taken the title with notice, either actual or constructive, of a building agreement between his grantor and the original owner, establishing a building restriction, he will be bound to abide by it, and equity will enforce it. In this case there is no question but that the defendant had notice of the building restriction from the record of the deed to the First M. E. Church, and if it was imposed in favor of the complainant's house and lot and for the benefit of the same, she would have a right to enforce it. The question is whether the agreement between King and his grantee, defendant's lot was burdened with the restriction, for the benefit of the complainant's lot so that she can enforce the agreement; there was no covenant or agreement between her and the defendant or its grantor. Her right to enforce the agreement depended upon her making it appear that it was entered into for the benefit of her lot. In making his conveyance John A. King had a legal right to impose the condition from any motive, and it is immaterial what that motive was, and he could impose it in favor of property which he did not own and which belonged to the complainant, if he saw fit to do so. There was no agreement outside of the deed, either between King and the complainant, or between either of them and the grantee. To establish the complainant's right she must show the in-

18—Frye v. Partridge, 82 Ill. 267.

tention of the restriction to have been to benefit her lot, and this intention must arise from the language of the deed, construed in the light of surrounding circumstances. The intention is to be ascertained as in other cases,—not by learning some secret or unexpressed intention in the mind of King, but from the language of the deed itself, considered in connection existing at the time of its execution. If the deed, in the light of the circumstances, expressed an intention to give the complainant's property the benefit of the restriction, she can enforce it in behalf of that property, otherwise not. In construing provisions restrictions are not favored, although where the intent is clearly manifested the court will enforce them. When a fee is conveyed, limitations and restrictions upon the use of the property are not favored, and all doubts, as a general rule, are resolved against them.¹⁹

To establish such an intention the complainant must show that the restriction was made in favor of her particular lot, and that the circumstances were such as to impart to the defendant notice, from the terms of the deed, and that such was the case.

Questions as to the rights of persons not parties to covenants and agreements of this character to enforce them have arisen under various conditions. In such cases there has been a general plan or scheme where each party was brought within the general plan and agreement entered into the purchase of each piece of property, and in such cases the agreement has been enforced between the grantees. Another case is where the vendor has sold a part of his land and imposed a restriction upon the lands retained in favor of the lands sold.²⁰

Another class of cases is where the owner sells a part of his premises and imposes a restriction upon the pur-

19—*Eckhart v. Irons*, 128 Ill. 568; 20—*Kirkpatrick v. Peshino*, 24 N. Hutchinson v. Ulrich, 145 Ill. 336; J. Eq. 206.
Ewertsen v. Gerstenberg, 186 Ill. 344.

chaser by which the lands retained will be benefited. Such a transaction is sufficient to show an intention that the restriction is for the benefit of the lands retained, and the grantor, and his subsequent grantee, can enforce it. (*Star Brewing Co. v. Primas*, 163 Ill. 652.)

The deed from King did not in terms express an intention or purpose to benefit the complainant's lot or to impose a restriction in favor of such lot, and the only reference to it is as a monument. The fact that he mentioned it in that way is not sufficient to show that he designed to protect the light, air or view or to give an interest in the property. Where the restriction is for the benefit of a particular piece of property, as is made to appear from the terms of the agreement, it can be enforced by the owner of such property. Outside the language of the deed there is nothing in the circumstances which could have any reasonable relation to the complainant, except the fact that she was the daughter of King, and such relation would not be sufficient to sustain the complainant's claim. If such regard, alone, without any agreement or obligation, would have that effect then a more distant relationship might be resorted to for the same purpose, or mere friendship be considered as adding to the terms of the deed.²¹

Restrictive covenants which hamper the free use of the property are strictly construed against the restriction, and all doubts should be resolved in favor of the free use of the property and where there is a sharp conflict in the evidence as to whether the building erected on the premises violates the restriction in the deed the doubt should be resolved in favor of the building and against the restriction.²²

§ 1333. Covenants Defined and Explained—After the habendum clause in a deed it is usual to insert such covenants therein as the parties may desire; and it may be

21—*Hays v. St. Paul M. E. Church*,
196 Ill. 633.

22—*Boylston v. Holmes*, 276 Ill.
279.

said here that there is no limit as to the number or kind of covenants which may thus be inserted. A covenant is an agreement entered into, with the usual requirements as to agreements, by the parties thereto in an instrument under seal.

Covenants are either expressed or implied. *Express covenants* are those which are created by the express words of the parties in their contracts or agreements, declaratory of their intention. *Implied covenants* are those which arise by intendment and construction of law from the use of certain words in their contracts. But whether the covenant be expressed or implied, it must arise and be enforced by virtue of an instrument under seal. It is not necessary, however, that the covenantor should execute the instrument; he will be bound by it if he accepts the benefits it confers on him. No particular form of words are needed to be used to raise a covenant, either expressed or implied. Any words showing the intention of the parties to do or not to do a certain thing are all that is necessary to raise a covenant.²³

§ 1334. Construction—Covenants Preferable to Condition—If it be doubtful whether a clause in a deed be a covenant or a condition the courts will incline against the latter construction, for a covenant is far preferable to the tenant. This is the recognized rule in this State. The intention of the parties to the instrument, when clearly ascertained, is of controlling efficiency, though conditions and limitations are not readily to be raised by mere argument. The question is one not depending so much upon artificial rules of construction as upon the application of good sense and sound equity to the object and spirit of the contract.²⁴

In the construction of deeds, the courts will always in-

23—Bouvier's Dic. "Covenant"; 1 Wash. on Real Prop. 324; 2 Ibid. 589.

24—Druecker v. McLaughlin, 235 Ill. 367.

cline to interpret the language as a covenant rather than as a condition. Where there is nothing in the form of the language employed to indicate that it was intended that the conveyance was upon a condition subsequent, that the words "upon condition" were not used, and there were no other words of equivalent meaning, and there was no clause of re-entry, which are the usual indications of an intent to create a condition subsequent, the deed will be construed as containing a covenant and not as containing a condition subsequent.

The rule is that a court of equity will never lend its aid to divest an estate upon condition subsequent. But where compensation can be made in money, courts of equity will relieve from such forfeitures and compel the party to accept a reasonable compensation in money.²⁵

§ 1335. Difference Between Various Kinds of Covenants—There is a marked difference between covenants of seizin, the right to convey, against encumbrances, and those of warranty, quiet enjoyment, and further assurance; the covenants of seizin, the right to convey and against encumbrances, are all in the present tense, relating to something being or existing at the time when the covenant is made; while those relating to warranty, quiet enjoyment, and further assurance refer to something in the future, and are to be guarded against the consequences of some future act, or for the performance of some future act which the condition of the title to the estate may require.

Two important consequences grow out of this from the first named covenants, viz.: that, if they are ever broken, the breach is simultaneous with the making of the covenant. If the grantor was then seized, he had made good his covenant, and he had a right to convey; if he was not seized, he violated his covenant as soon as made, and he had no right, at common law, to convey the estate, and noth-

²⁵—Galleher v. Herbert, 117 Ill.

ing passed by the deed. So with encumbrances, these did or did not exist when the deed was made, and if they did, the covenant that they did not was then broken.²⁶

§ 1336. **Deed with Full Covenants**—In order that a deed should be one of full covenants, as the same was understood by the old conveyances, it should contain: *first*, a covenant that the grantor was well seized of the estate which he purported to convey, called the covenant of seizin; *second*, that he had a good and perfect right so to transfer it; *third*, that the grantee should quietly possess and enjoy the premises without interruption, called the covenant of quiet enjoyment; *fourth*, that the title should be free and clear of all incumbrances, leases, trusts, etc., called the covenant against incumbrances; *fifth*, that such other deeds or instruments should thereafter be executed as might be necessary to perfect and confirm the title, called the covenant of further assurance, and *sixth*, the covenant of warranty.

So, where a contract called for the execution of a deed with full covenants, it was not fulfilled unless such a deed was tendered by the grantor.²⁷

§ 1337. **Covenant of Seizin Defined**—A covenant of seizin is defined to be an assurance to the grantee that the grantor has the very estate, both in quantity and quality, which he professes to convey.²⁸

§ 1338. **Action on Breach of Covenant of Seizin Not Assignable**—The covenant of seizin and the right to convey are covenants *in presenti*; and if the covenantor, at the time of his conveyance, had no title, it is broken at the time of the conveyance, and a right of action at once accrues to the covenantee; such right is a mere chose in action, which is personal and not assignable, so as to enable the subsequent

26—*Newman v. Sevier*, 134 Ill. App. 544.

28—*Newman v. Sevier*, 134 Ill. App. 544.

27—*Murphy v. Lockwood*, 21 Ill. 611.

grantee of the covenant to sue in his own name. They do not run with the land.²⁹

There is no question that want of title, without eviction, is a breach of the covenant of seizin; but the grantee cannot remain in undisputed possession of the land, enjoying the rents and profits, without delivering up possession to his grantor, or re-conveying, or offering to re-convey, and yet successfully defend against notes given for the purchase money; he cannot keep both the land and the price of the land.³⁰

Covenants of seizin and of good title to convey are broken, if at all, when the deed is delivered. They are personal covenants, not running with the land, and are *in presenti*. Their breach depends upon no future contingency. If the grantor is not well seized, or does not have good right to convey, when the deed is delivered, an action at once accrues, and a recovery may be had.³¹

§ 1339. Covenant Against Incumbrances, Broken When Made—The text books announce the general rule that covenants against incumbrances are broken as soon as made, if at all, and are, therefore, personal, and do not run with the land. But the Supreme Court of this State refused to adopt that doctrine so far as relates to incumbrances consisting of a money charge upon the land, such as a mortgage securing debt, but as to such incumbrances held that such a covenant runs with the land.

It is admitted that there is a technical breach of such a covenant when made, giving the covenantee a cause of action to recover nominal damages only, but it was held that he who removes the incumbrance, whether immediate or remote grantee, has a substantial cause of action. If such covenant were, as to the original grantee, merely a

29—Newman v. Sevier, 134 Ill. App. 544; Jones v. Warner, 81 Ill. 343; Tone v. Wilson, 81 Ill. 529.

30—McDaniel v. Bryan, 8 Ill. App.

273.

31—Dalton v. Taliaferro, 101 Ill. App. 592; Richard v. Bent, 59 Ill. 38; Post v. Campau, 42 Mich. 90.

personal covenant, then, being broken as soon as made, the statute of limitations would at once run against the covenantee, and if he removed the incumbrance after the lapse of the time fixed by the statute of limitations, even though his delay was because the incumbrance had not matured earlier, he would be barred of relief upon the covenant, which would be very unjust.³²

A remote grantee of lands may maintain an action in his own name against the original grantor, on a covenant in a deed of the latter, that the said lands are free from incumbrances, where the substantial breach of the covenant occurs after the assignment, and the whole actual damages is sustained by the assignee. Although in such cases covenants are nominally broken on the execution of the deed, the rule of common law, that choses in action are not assignable, does not apply.³³

A right of dower is an incumbrance within the terms of a warranty deed, and it is immaterial whether the right of dower is inchoate or consummate.³⁴

A lien for taxes is an incumbrance, which operates as a breach of covenants against incumbrances.³⁵

§ 1340. Right of Covenantee to Remove Incumbrances—
A right exists in the covenantee to remove an incumbrance where it is certain in amount, and he may pay off and discharge the same, and where he does so, and his deed contains a covenant against incumbrances, he may set off such sum as is fairly and reasonably necessary to pay for such purpose, against the amount due for the purchase money of the premises.

While there is some conflict in the decisions of the various States on the question as to whether the right of recovery or set-off by the grantee, with covenants against incumbrances in his deed, exist to the extent of the sum

32—*King v. Gilson*, 32 Ill. 348.

33—*Richard v. Bent*, 59 Ill. 38.

34—*McCord v. Massey*, 155 Ill. 123.

35—*North Chicago H. Con. v. Gribaldi*, 70 Ill. App. 33.

actually paid by him, the great weight of authority sustains the view that the burden of proof is upon the grantee, not only to show the amount paid, but that such amount was the reasonable and fair value of the interest acquired.³⁶

§ 1341. Conveyances Made Subject to Incumbrances—It is a rule of law in this State, that where a grantee in a deed conveying lands upon which there is a mortgage securing an indebtedness, assumes and agrees to pay that mortgage debt as a part of the consideration for which the lands are conveyed to him, he thereby becomes personally liable to the mortgagee for the payment of the debt, and is liable for any deficiency upon a foreclosure of the mortgage and sale of the premises, or he may be sued at law by the mortgagee. His liability by such assumption is the same as if it were his individual debt and a remedy may be had against him for the collection thereof.³⁷

And the rule is the same, although there be no assumption of payment of the indebtedness, if the purchase be made expressly subject to the incumbrance, and the amount of the indebtedness thereby secured is included in and forms a part of the consideration of the conveyance.³⁸

Where a deed with covenants of warranty conveys lots subject to an incumbrance therein mentioned, the covenants of warranty contained in the deed will extend only to the estate actually conveyed, which is the equity of redemption.³⁹

§ 1342. Covenant of Further Assurance—Under a covenant of further assurance, an after acquired title by the grantor inures to the benefit of his grantee, as well as under the covenant of warranty. The reason why this is so is, because it effectuates the real intention of the par-

36—McCord v. Massey, 155 Ill. 123.

37—Ingram v. Ingram, 172 Ill. 287; Dean v. Walker, 107 Ill. 540; Daub v. Engelbach, 109 Ill. 267; Bay v. Williams, 112 Ill. 91; Schmidt v. Glade, 126 Ill. 485; Fish v. Glover, 154 Ill. 86.

38—Lilly v. Palmer, 51 Ill. 331; Comstock v. Hitt, 37 Ill. 542; Fowler v. Fay, 62 Ill. 375.

39—Drury v. Holden, 121 Ill. 130.

ties, which was to convey the true and real title to the land, and to avoid circuity of action and further litigation. And this covenant runs with the land, for the benefit of subsequent grantees.⁴⁰

A covenant of further assurance is usually inserted in English deeds, but rarely in those in use in this country. It is resorted to, when inserted, rather as a means of enforcing a specific performance of the grantor's agreement to make a good title, than as a ground of a suit at law, for its breach.

Our statute in regard to after acquired title, renders the embodiment of this covenant in deeds almost useless.⁴¹

§ 1343. Covenant of Warranty—The broadest and most effective of the covenants contained in American deeds, is that of warranty, which in some States is the only one in use. It is future in its terms and operation, and runs with the estate, in respect to which it is made, into the hands of whomsoever becomes the owner of such estates.⁴²

The covenant of warranty is in legal effect the same as a covenant of quiet enjoyment. The true meaning of the covenant is said to be that the grantee, his heirs and assigns, shall not be deprived of the possession of the premises by force of a paramount title.⁴³

A covenant of warranty of title and of quiet possession is against one lawfully claiming or seizing the property, and not against one who unlawfully claims or seizes it.⁴⁴

Where a party makes a conveyance of an entire tract of land, with the usual covenants of warranty of title, and against incumbrances, not having title to a certain portion thereof, the covenant will be broken immediately, and the grantee entitled to an action thereon, although he may have known at the time of the defect in the title.⁴⁵

40—Bennett v. Waller, 23 Ill. 97;
Holbrook v. Debo, 99 Ill. 372.

41—2 Wash. on Real Prop. 667.

42—2 Wash. on Real Prop. 660.

43—Newman v. Sevier, 134 Ill. App.
544.

44—Pierce v. Croyn, 126 Ill. App.
244.

45—Wadhams v. Swan, 109 Ill. 47.

§ 1344. Covenant of Warranty Extends to Equitable Titles—In a certain case it was claimed by the defendant that the covenants in his deed extended only against subsisting legal claims, and did not extend to equitable claims. But the court said that where there is an outstanding equitable title, which is entitled, as against the grantee as well as against the grantor, in a deed of full covenants, to have united to it the legal estate, and so defeat the estate assumed to be conveyed by the deed, by claim paramount, the covenant must certainly extend to and embrace such equitable claim.⁴⁶

§ 1345. Breach of Covenant of Warranty—As the covenant of warranty in American deeds answers in most respects to the covenant of quiet enjoyment, it has uniformly been held, that in order to constitute a breach of such a covenant, there must be something tantamount to an eviction of the tenant, by some one having a better legal title. It will be a breach of the covenant if the covenantee is dispossessed of any part of the premises. No act of a mere stranger, though under a pretense of a title which is not a valid one, will operate as a breach of this covenant. But if one having a legal claim seeks to enforce it by expelling the tenant in possession, it is not necessary for such tenant to wait for a judgment and actual ouster by process of law. He may yield possession to the one who has the paramount title, and claim for a breach of the covenant.

It has been stated, however, that there is a difference between an eviction under the covenant of quiet enjoyment, and one under that of warranty. The former relates only to the possession, and the eviction is merely to be of the lawful right, while the latter relates to the title, and the eviction must be not only by lawful right, but by paramount title, and this may account for any apparent discrepancy in the authorities on this subject.

But the mere existence of a superior title in another,

46—Dugger v. Oglesby, 99 Ill. 405.

which has never been enforced, cannot amount to a breach of this covenant. The tenant must be disturbed, he must be evicted, or the premises being vacant, that the rightful owner has taken possession.⁴⁷

§ 1346. Covenant Not Broken by Reason of Highway—Statute—It is enacted: "That no covenant of warrant shall be considered as broken by the existence of a highway upon the land conveyed, unless otherwise particularly specified in the deed."⁴⁸

The term highway as used in the Conveyance Act applies to public highways and not to private ways. A private way over the land of another is an incumbrance on such land, and a breach of a covenant against incumbrances in a deed of such land, and the damages resulting from such breach may be set off in a bill to foreclose a mortgage given to secure the purchase money thereof.⁴⁹

A railroad right of way over land conveyed is also a breach of such a covenant, and gives a right of recovery.⁵⁰

§ 1347. Lease by One Tenant in Common—Where there are tenants in common of land, and one of them executes a lease under seal in his own name, for the whole of the land, and gives the lessee possession, and the lessee has possession and quiet enjoyment of the premises during the whole term limited by the lease, the court will not hold that such a lease is void, and that the lessor cannot enforce any of the covenants in the lease.⁵¹

§ 1348. Covenants Running with the Land—It may not be easy to define, in a few words, what is meant in all cases, by the expression "privity of estate." But it is apprehended that in the matter of a covenant running with the land, the language of the court in the case of *Hurd v. Curtis*, 19 Pick. 459, furnishes a sufficient clue. It was there said

47—2 Wash. on Real Prop. 664-667.

526; *Young v. Gower*, 88 Ill. App. 70.

48—Sec. Laws of 1874, R. S. 1874, p. 280.

50—*Beach v. Miller*, 51 Ill. 206.

51—*Harms v. McCormick*, 132 Ill.

49—*Schmisser v. Penn*, 47 Ill. App.

104.

278; *Penn v. Schmisser*, 77 Ill. App.

in respect to covenants regarding separate estates of the parties, "Their estates are several, and there is no grant of any interest in the real estate of either party to which the covenant could be annexed."

It is conceived, in accordance with this idea, that such covenants, and such only, run with the land as concern the land itself, in whosoever hands it may be and become united with, and form a part of, the consideration for which the land, or some interest in it, is parted with, between covenantor and covenantee. If one sell land to another and give him therewith a covenant for title, he pays just so much for the land as the covenant enhances the price. And the same would be true with a purchaser from the vendee who, relying upon the covenant, pays him a price enhanced accordingly. And if the title fails, such second purchaser ought to be the one to receive from the covenantor the money originally paid for his agreement to make it good. So the covenant becomes a part of the estate itself, and whoever takes the estate should have the benefit of the covenant.

This subject is very fully examined and considered in Sugden on Vendors, 468-484.⁵²

A covenant runs with the land when either the *liability* for its performance or the *right to enforce* it, passes to the assignee of the land itself.

In order that a covenant may run with the land, its performance or non-performance must affect the nature, quality or value of the property, independent of collateral circumstances, or must affect the mode of enjoyment. It must not only affect and concern the land, but there must be a privity of estate between the contracting parties, for if a party covenant with a stranger in consideration of a benefit to be derived under a third person, it cannot run with the land, not being made with a person having the legal estate.

52—2 Wash. on Real Prop. 15-17.

Whether a covenant will or will not run with the land does not depend so much on whether it is to be performed on the land itself, as to whether it tends directly or necessarily to enhance its value, or render it more beneficial and convenient to those by whom it is owned or occupied. And, in cases falling within the rule, every successive assignee of the land will be entitled to enforce the covenant.⁵³

A covenant will run with the land, when it tends directly or necessarily to enhance its value, or render it more beneficial or convenient to the owner or occupant.

The authorities seem to be unanimous that where a conveyance is made of real estate upon the condition that the grantee shall pay a specified sum of money to a third person, or pay the debts of the grantor or of some third person, the acceptance of the conveyance by the grantee with such a clause in the deed creates a covenant on the part of the grantee to discharge the obligation, and creates the relation of trustee and *cestui que trust* between the grantee and the person for whose benefit the payment is to be made, without any act or assent on the part of the beneficiary.

A clause in a deed reading as follows: "Upon the condition that the grantee assumes and pays all debts, claims and obligations owing by the said Roswell Dow, deceased, with the necessary costs of administration of estate," was held to create an express trust in favor of creditors of Roswell Dow, binding upon the grantee and all subsequent purchasers with notice. In other words, it was a covenant or obligation running with the land, binding upon the grantees of the original grantee.⁵⁴

From this and other cases it may be gathered that anything which the grantee assumes and agrees to do, as a part of the consideration for the conveyance of the land,

53—Dorsey v. St. L. A. & T. H. R. Co., 58 Ill. 65; Wiggins Ferry Co. v. O. & M. Ry. Co., 94 Ill. 83; Gibson v. Holden, 115 Ill. 199; Sanitary Dis-

trict of Chicago v. Martin, 227 Ill. 260.

54—Koch v. Streuter, 232 Ill. 594.

is a covenant on the part of the grantee, running with the land and may be enforced against him and his grantees, by the grantor, his heirs, devisees or assigns.⁵⁵

Where a deed contains a covenant to the effect that "It is understood and agreed, as a part of the consideration expressed above, that only a single dwelling is to be constructed or placed on each fifty-foot lot, and that no building shall be placed upon the east thirty feet of said premises," if there be any violation of this clause in the deed by the defendants who claim under the grantee therein, they will be bound by the condition as it appears in their chain of title, and the purchasers of the *remaining lots* may invoke the aid of a court of equity in their favor.

Undoubtedly it is a covenant running with the land.

Where a deed contains a covenant that the grantor will sell the remaining lots in a subdivision to parties who will cause to be erected single dwellings, only, on each lot of fifty feet, such covenant inures to the benefit of all subsequent purchasers of the remaining lots in the subdivision, and by the terms of the covenant an easement was created in their favor as to all the lots sold after the execution of the first deed.⁵⁶

There are authorities which hold that if the character of the neighborhood has changed so as to defeat the purpose of the covenant, and thus render its enforcement unreasonable, it will not be enforced. But in most cases where this doctrine has been applied, it will be found that two elements exist. First, where the change in circumstances has resulted from some act of the grantor, in the deed or those holding under him; second, the enforcement of the covenant would work serious injury to the property or the property rights of the grantee in the deed, or of the party against whom it is sought to enforce the covenant. It is, as a general thing, where the acts of the grantor, or those

55—Sanitary District of Chicago v. Martin, 227 Ill. 260.

56—Hutchinson v. Ulrich, 145 Ill. 336.

deriving title under him, have altered the character and condition of the adjoining land so as to make the restriction of the covenant inapplicable according to the intent and spirit of the contract, that courts of equity refuse to interfere by injunction to prevent a breach of the covenant and leave the party to his remedy at law.

Where the change in the condition of the surrounding property is such that the performance of the covenant in the deed would injure the grantee's property, or make it yield less profit, or make it incapable of yielding any profit, the covenant will not be enforced as being unreasonable and oppressive. Where, for instance, the covenant required that only dwelling houses, or dwelling houses of a certain price, should be erected, and that the premises should not be used for trade or business, and the neighborhood had so changed that only dwelling houses of a cheaper kind, or houses for trade and business, would be profitable, the court will refuse to enforce the covenant by injunction.⁵⁷

§ 1349. Covenants Running with the Land Not Transferable Independently—Go with the Land—Covenants running with the land ought to be governed and construed by the same laws as the granting part of the deed. They cannot be separated from the land, and transferred without it, but they go with the land, as being annexed to the estate, and bind the parties *in respect to the privity of estate*.

It is not sufficient that the covenant is concerning the land, but to make it run with the land there must be a privity of estate between the covenanting parties, and the covenant must have relation to an interest created or conveyed, in order that the covenant may pass to the grantee of the covenantee. In respect to covenants for title it is necessary to their validity that the deed in which they are contained should be valid as a conveyance, for if the deed be void, all covenants of this sort which derive their life

⁵⁷—*Star Brewery Co. v. Primas*,
163 Ill. 652.

from the conveyance to which they are annexed, are void also.

It would contravene these rules to hold that covenants running with the land are valid because the laws of the State where the instrument was executed, if the instrument does not convey the lands for want of words of grant required by the laws of the State where the land is located. The meaning and the validity of the words of grant, and of the words supposed to create covenants running with the land, must stand or fall together, and, therefore, must be governed by the same law.⁵⁸

§ 1350. Covenants Implied by the Words Grant, Bargain and Sell—Statute—"In all deeds whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs, or other legal representatives, the words "grant," "bargain," and "sell," shall be adjudged to express covenant to the grantee, his heirs, and other legal representatives, to wit: that the grantor was seized of an indefeasible estate in fee simple, free from incumbrances done or suffered by the grantor, except rents and services that may be reserved, as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed; and the grantee, his heirs, executors, administrators and assigns, may, in any action, assign breaches, as if such covenants were expressly inserted: *Provided, always*, that this law shall not extend to leases at rack-rent, or leases not exceeding one and twenty years, where actual possession goes with the lease."⁵⁹

The words "grant, bargain and sale" under our statute in a conveyance, only amount to a covenant, that the grantor has done no act, nor created any incumbrance, whereby the estate granted can be defeated. It is a cov-

58—Dalton v. Talioferro, 101 Ill. App. 592.

59—Sec. 8, Ch. 30, R. S. .

enant against the acts of the grantor. Our statute is a copy of the Pennsylvania Act of 1715, and that act was so construed by the courts of that State, and we adopt that construction which before had been given to the words.⁶⁰

§ 1351. Statute Creates No Covenant Against Intention of Parties—Statute Strictly Construed—The words “grant, bargain and sell,” implied no covenant at common law, and the statute was intended to give effect to these words which they did not possess at common law. They are to be considered collectively, and if one of these words may be dispensed with in the creation of the covenant named in the act, so may others, and the introduction of either of them in a deed might be made to operate as a covenant under the statute, when, perhaps, it was never thought of by either of the parties, and it has been expressly held that covenants will only be implied where all the words of the statute have been used.⁶¹

This statute does not create a covenant against the intention of the parties; but only where they intend that this statutory covenant shall operate and have effect, for the legislature has provided that these words shall not have that effect if they are limited by express words in the deed. It would seem to be clear that the employment of any language from which it appears that the parties intended that these words should not have such an effect, would be sufficient to do away with this statutory covenant. At common law these words had no technical meaning attached to them; they never have been employed to imply a covenant of any kind, although they have always been employed in granting clauses of conveyances. And the embodiment of general covenants in a deed should operate as controlling the rights of the parties, and be a sufficient reason to disincline courts to extend their operation beyond the cases clearly indicated

60—*Prettyman v. Wilkey*, 19 Ill. 245. 599; *Pierce v. Coryn*, 126 Ill. App. 244.

61—*Wheeler v. Wayne County*, 132

by the enactment. The general covenant of warranty is broad enough to cover the special statutory covenant against incumbrances by the grantor.⁶²

The words "grant, bargain and sell" were given the effect of a covenant by the statute of 6 Anne, C. 35. The statute of Illinois, though taken from Pennsylvania, is in substance that of 6 Anne.⁶³

The words "grant, bargain and sell" in a deed under the statute, amount to an express covenant that the grantor was seized of an indefeasible estate in fee simple in the premises conveyed, and, also, covenant of quiet enjoyment of the vendee.

A covenant of warranty in a deed, that the heirs, executors and administrators of the grantor shall defend the title, does not qualify or narrow the covenant expressed in the words "grant, bargain and sell."

A declaration which declares upon a covenant contained in the words "grant, bargain and sell," and sets out at length the purport of these words, as the statute declares them, is a good declaration, and not obnoxious to a demurrer.⁶⁴

§ 1352. Husband or Wife Joining in Conveyance to Release Dower—Where the object of a husband or wife in joining in a deed containing covenants, is simply to release his or her dower rights in the land conveyed, the covenants contained in such deed are not in such case binding on such husband or wife.⁶⁵

§ 1353. Pleading Breach of Covenant—A breach of the covenant is sufficiently alleged by an allegation that the defendant has not kept his covenant, but has broken the same.⁶⁶

62—Finley v. Steele, 23 Ill. 56. (54.)

63—Wheeler v. Wayne County, 132 Ill. 599.

64—Hawk v. McCullough, 21 Ill. 220.

65—Center v. Elgin City Banking Co., 185 Ill. 534.

66—Leman v. United States F. & G. Co., 137 Ill. App. 258.

The rule is that a covenant cannot be sued upon by the person for whose benefit it was made, if he is not a party to the deed, but that such suit must be brought in the name of the person with whom the covenant was made.⁶⁷

§ 1354. Measure of Damages on Breach of Covenant and Burden of Proof—It is a rule of general application, that in all actions on contract, sounding in damages, and of the character of covenant, the plaintiff is entitled to recover damages only to the extent of the injury sustained. If circumstances exist which mitigate the injury, they must be considered in measuring the damages. So in an action for the breach of a covenant that the grantor was well seized and had good right to convey, if it be shown that after the conveyance the grantor secured the adverse title, and that the same inured to the benefit of the grantee, he can only recover nominal damages.⁶⁸

Where the title to the land conveyed fails as to the whole tract purchased, the grantee would be entitled to recover from his grantor, under his covenants of title, the consideration paid for the land and legal interest thereon.

But where the title to a part of the tract only fails where the land has been sold for a gross sum, the measure of damages for a breach of covenant would be the relative value of the land to which the title has failed, as compared with that to which the title is valid, in proportion to the price paid for the whole.

In either event, however, where there has been no eviction, but a paramount title has been purchased in, and less is paid for the same than the consideration originally paid, the recovery will be limited to the amount paid and interest.⁶⁹

A limitation always exists, however, as to the amount recoverable for a breach of a covenant against incum-

67—*Harms v. McCormick*, 132 Ill.
104.

68—*King v. Gilson*, 32 Ill. 348.

69—*Weber v. Anderson*, 73 Ill. 439.

brances, as the amount recoverable is never allowed to exceed the purchase money, with interest thereon.

The law provides a remedy by damages to be awarded for the proximate results of a breach of covenant. But such damages are not to be determined by one party to the covenant, and proof of the damages must be made in accordance with the legal principles, and the burden is on the party asserting such damage, where more than nominal damages is sought to be recovered.⁷⁰

In an action for deceit for fraudulently representing the quality or quantity of the property sold, the general rule is, the difference between the value of the property as it is and what it would be worth if the representations had been true. And the same rule holds upon the sale of real estate, where the action is for deceit.⁷¹

Although a deed may contain full covenants of warranty, but the deed is not for the conveyance of the property absolutely, but is subject to the incumbrances, the covenants extend only as to what was conveyed, that is, to the property subject to the incumbrances. Where the question is what constituted the consideration for the deed and the amount of the incumbrance is included and forms a part of the consideration, it is competent by parol evidence to show this fact. It has been uniformly held that the statement of the amount of the consideration and the acknowledgment of its receipt in the deed are mere formal recitals, their only operation, in law, being to prevent a resulting trust, and they may be varied, explained and contradicted by parol evidence.⁷²

§ 1355. **Action on Lost Instrument**—Where the declaration makes profert of the deed containing the covenants declared on, and there is a plea of *non est factum*, but it appeared that the deed was lost, and could not be found, the

70—McCord v. Massey, 155 Ill. 123.

72—Brosseau v. Lowy, 209 Ill. 405.

71—Antle v. Sexton, 137 Ill. 410;

Drew v. Beall, 62 Ill. 164.

admission of a certified copy of the deed was held to be erroneous. The plaintiff should have declared on a lost instrument.

Mr. Chitty, after stating the general rule that in all pleadings, if a party makes claim under a deed he must make a profert of it, or allege an excuse for the omission, lays it down: "But where a profert, or an excuse for the want of it, is necessary, if the plaintiff makes profert of and thereby professes to produce the deed when he is not prepared to do so, and the defendant pleads *non est factum*, the plaintiff will be nonsuited on the trial, as it will not be sufficient in such case to prove the deed was lost or destroyed, or in the defendant's possession. If, therefore, in such case, the plaintiff be not prepared to produce the deed on oyer being claimed, or at the trial, and has inadvertently pleaded the deed with a profert, the declaration must be amended, and the circumstances which excuse the omission to make a profert should be stated in the declaration." (1 Chitty, Pl. 399.)

And this objection is not obviated by our statute, which provides that a party, by first complying with its provisions, may read in evidence the record of any deed, or a certified copy thereof, with like effect as though the original of such deed was produced and read in evidence. (R. S., p. 278, sec. 36.) But this is a statute relating to evidence alone, and does not affect any rule of pleading. It applies only where, under the rules of pleading, secondary evidence of the contents of a deed is admissible. Where profert is made the statute will not apply.⁷³

§ 1356. Grantee Without Remedy in Deed Without Covenants—It is one of the best settled principles of the law, that a purchaser who has received no covenants which cover defects or incumbrances, can neither detain the purchase money nor recover it back if already paid.

In the sales of lands, the technical rule remits the grantee

⁷³—Dugger v. Oglesby, 99 Ill. 405.

back to his covenants in his deed; and if there be no ingredient of fraud, accident or mistake in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money, even on failure of title. This is the rule both at law and in equity. So where a party takes a quitclaim deed to lands he takes the risk of the goodness of the title. Such deeds are made because the vendor is unwilling to warrant the title, and they are accepted because the grantee is willing to take the hazard of the title and believes it is worth the price he is paying for it.

Where land is sold and conveyed without warranty, under the mistaken belief that the grantor has title, the real fact being unknown to both parties, and where each has equal means of information, and there is no fraud, the grantee cannot recover on failure of title, on the ground of mutual mistake of the parties as to the title, in a court of equity. Such a case is strictly *damnum absque injuria*.⁷⁴

§ 1357. Law of State Where Land Is Situated Controls Conveyances and Covenants—The validity and construction, as well as the force and effect of all instruments relating to the title to land, depend upon the law of the State where the land is situated. The rule in this regard may be thus stated: "If the instrument be made in one State for the conveyance of realty situated in another, or for the creation or imposing any lien thereon, or in any manner affecting the title thereto, then, under all circumstances, it must, in substance and in its execution, and also in the evidences thereof, conform to the law of the place where the land to be affected thereby is situated; for it is a well settled principle of the law that the jurisdiction over real property is local, and appertains to the State wherein the property lies, and that the title thereto passes only in con-

⁷⁴—*Botsford v. Wilson*, 75 Ill. 132;
Barry v. Guild, 126 Ill. 439.

formity to the law of such State." (Roror on Interstate Law, 285.)

This rule not only extends and applies to those portions of the deed which concerns the transfer of property, such as the capacity of the parties to contract and hold, the formalities necessary to a valid transfer, the dominion over and enjoyment of the land by the grantee, the right of succession to the title, and the like, but, also, to the covenants in a deed, except, perhaps, to such covenants as are purely personal, and are broken as soon as made and which do not run with the land. The plain inference from most of the cases is, that the law of the land where the deed was executed does not control the construction of covenants which run with the land, and that such covenants depend upon the law of the State where the land lies.⁷⁵

§ 1358. **Covenants Binding on Grantee**—The contention that in order to create a covenant operative upon a grantee in a deed it is necessary that the grantee should sign and seal the deed, is not the law in this State. A grantee, who accepts a deed with a covenant imposing duties upon him, is as much bound by such covenant as though he had signed and sealed the deed.⁷⁶

In the case of *Rockford, R. I. & St. L. R. R. Co. v. Beckemeier*, 72 Ill. 267, the declaration consisted of three counts in covenant. It counted on a deed poll, executed by the plaintiff to the defendant, for a strip of land through his farm. The consideration was, among other things, that the defendant should erect a depot building upon the section of land upon which the farm of the plaintiff was situated, and near the north line of the farm, and also erect a fence on each side of the strip. The deed was delivered to and accepted by the defendant. It was averred that the defendant took possession and immediately built its railroad

⁷⁵—*Dalton v. Taliaferro*, 101 Ill. App. 592.

⁷⁶—*Druecker v. McLaughlin*, 235

Ill. 367; *Sanitary District of Chicago v. Chicago T. & T. Co.*, 278 Ill. 529.

over the same, and has since used and possessed the same. It was then averred that the defendant, by accepting the deed and taking and holding the land, covenanted to perform the conditions in the deed. The breach negatives the performance of the conditions, and avers that the defendant has failed and refused to build the depot and fences according to the terms of the condition in the deed. A trial was had and a verdict and judgment for the plaintiff was rendered.

On appeal to the Supreme Court the court endorsed the rule: "that the action of covenant could not be maintained, except against a person who, by himself or some other person acting in his behalf, has executed a deed under seal, or who, under very peculiar circumstances, had agreed, by deed, to perform the covenants, and, consequently, covenant would not lie," unless such were the case. It was further said that this rule seemed to be strictly in accordance with the general and well settled practice. It was admitted, however, to be true that where the covenant was inherent, or runs with the land, the heirs, executors, administrators and assigns may be bound by such covenants. But that is an exception to the general rule, and in the case at bar the court was clearly of the opinion that the action was misconceived.⁷⁷

Again it is said: The forms of pleading are touchstones of the law; and the most dexterous pleader would find himself unable to make a successful profert of a deed poll, as the act of one who has not signed it.⁷⁸

While the tendency of the courts may be toward a greater liberality in matters of pleading, in order that substantial justice may be done speedily, still our courts have not yet gone so far as to depart from the common law rules of pleading as to permit a recovery in covenant under a dec-

77—Rockford, R. I. & St. L. R. R. Co. v. Beckemeier, 72 Ill. 267; Walker v. Kesner, 86 Ill. App. 244; Hancock v. Yunker, 83 Ill. 208.

78—Willenborg v. Illinois C. R. R. Co., 11 Ill. App. 298.

laration which sets forth a breach of an implied warranty or a tort.⁷⁹

But the question is, not whether the defendant may be held to the plaintiff in a proper form of action, but whether he is liable in the action of covenant.⁸⁰

But whether such a condition, when found in a deed poll, under which the grantee enjoyed the estate, is strictly his covenant or not, it is universally conceded that by the act of accepting and enjoying the benefit conferred by the deed there is imposed an obligation or duty upon the grantee to perform the condition. Having accepted the grant, he cannot be heard to deny the condition, and may be compelled to perform it.

While an action of covenant will not lie where the defendant has not by deed engaged to perform the covenant, yet assumpsit will. Assumpsit is technically an action on the case, and may be resorted to where there is a breach of contract, expressed or implied, for the payment of money or for the performance or the omission of any other act. Where one accepts a deed poll containing a reservation of certain duties to be performed by the grantee, assumpsit lies for the breach of these duties. So it was held that assumpsit would lie against a railroad company where it had accepted a deed of certain lands in which it was provided that it would erect and maintain such crossings as may be necessary for the accommodation of persons whose lands are divided by said track, and erect suitable fences, and it had failed to comply with such provision. And an action could be maintained by the grantee of the grantor to the railroad company.⁸¹

In some of the authorities it is held, as a general rule, that a promise, in order to be binding as a covenant, must be under the seal of the party by whom it is to be per-

79—Walker v. Kesner, 86 Ill. App.

81—Willinborg v. Illinois C. R. R.

80—Hancock v. Yonker, 83 Ill. 208. Co., 11 Ill. App. 298.

formed. But by other authorities a different rule prevails, and it has been held that if an estate is conveyed by deed *inter partes*, containing covenants to be performed by the grantee, and he accepts the deed, though only signed and sealed by the grantor, it will be the deed of both of the parties, and the grantee will be as effectually bound by it and its covenants as though he had executed the instrument.

So where in a deed executed by the grantor to the Sanitary District of Chicago, of certain lands, which contained stipulations for the doing of certain work by the Sanitary District for the benefit of other lands of the grantor not conveyed by the deed, it was held that the grantee of the grantor of such other lands might maintain a bill in equity for the enforcement of such covenants.

And, further, if it was found impracticable to decree a specific performance of the contract, then the court might properly assess the damages for the breach thereof.⁸²

§ 1359. Attestation Clause—This is usually the last clause in a deed and witnesses that the parties have executed it by affixing their hands and seals.

Our statute does not require attesting witnesses as essential to the validity of a deed, nor has any court ever held that they were necessary under the common law. But the statutes of some States do require attesting witnesses. Our statute declares that where the conveyance is in writing, signed and sealed by the grantor, if he is free from disability, shall be good and sufficient to pass the title to the property. A party relying on a deed, not duly acknowledged, must have some means by which he can assert his rights by the deed under which title is vested in him. Where there are no subscribing witnesses to the deed, and it is not properly acknowledged, its execution may be proved by any one who saw it executed, or by proof of admissions of

⁸²—Sanitary District of Chicago v. Martin, 227 Ill. 260.

the grantor, or by any other competent evidence. And so he may be permitted to call other persons to establish the deed who are cognizant of the facts.⁸³

§ 1360. Deeds to Be in Writing, Signed and Sealed by Maker—The statute provides that every deed or other conveyance in writing, signed and sealed by the party making the same, shall be sufficient for giving, granting or otherwise conveying lands, tenements or hereditaments in this State.⁸⁴

And the Statute on Frauds and Perjuries provides that no action shall be brought to charge any person for the sale of lands or any interest therein unless such contract or some note or memorandum shall be in writing.⁸⁵

The deed must be signed by the maker. This may be done by the maker himself or by his attorney in fact. But if executed by the attorney in fact of the maker it must clearly appear to be the act of the principal and not of the attorney. It must appear that it was executed by the principal and not by the attorney. The signing must be expressed as the act of the principal by his agent or attorney. Consequently both names must appear on the paper, showing that the grant and the seal were those of the principal but also by whom the acts were done. So it has been held that where the attorney executed the deed by signing the principal's name only, and made no mention of its being done by the attorney, it was held not to be an execution by the principal. However, where the deed itself recited that it was executed by the grantor by his attorney, and it was simply signed by the name of the grantor, it was held to be a good execution of the instrument.⁸⁶

The production of the deed by the grantee, duly acknowledged, is sufficient proof of the due execution of the deed by the grantor.⁸⁷

83—*Dundy v. Chambers*, 23 Ill. 369.

84—Sec. I, Ch. 30, R. S.

85—Sec. 7, Ch. 30, R. S.

86—2 Wash. on Real Prop. 573.

87—*Roche v. Roche*, 286 Ill. 336.

§ 1361. **Lost Deeds—Clear and Convincing Testimony in Regard Thereto**—Where a deed itself is not introduced in evidence, and parol testimony in regard to its existence and contents is all that can be obtained, the testimony must be clear and convincing in every respect. Where the instrument rises to the dignity and importance of a monument of title every principle of public policy demands that the proof of its former existence, its loss and its contents should be strong and conclusive before the courts will establish a title, by parol testimony, to property which the law requires shall pass only by deed or will. It is the policy of the law adopted with a view to prevent frauds, that title to land shall pass only by written instrument, and the difference is more in name than in fact between giving effect to a parcel conveyance to lands and establishing a title to land under an alleged lost deed, upon parol testimony of its contents and loss, unless the proof is clear and conclusive.⁸⁸

Where the evidence of the contents of a destroyed deed is vague and uncertain, and no one testifies directly to the contents, yet if the circumstantial evidence is sufficiently definite as to the property conveyed in the deed, it is sufficient to convey the property claimed to be conveyed thereby.⁸⁹

It is a well established rule of evidence that everything will be presumed against the despoiler. This presumption, however, does not relieve the opposite party from the burden of proving the contents of the deed, but it does have the effect, where the evidence is vague and uncertain, of raising a presumption against the party who has destroyed the evidence which would make the facts clear.⁹⁰

Where a deed is taken by the grantor from the custodian who held it for the benefit of the grantee, and it is not produced, the presumption is that it was destroyed by the grantor for the purpose of destroying its effect as a

88—Shipley v. Shipley, 274 Ill. 506.

89—Hudson v. Hudson, 287 Ill. 286.

90—Noffs v. Noffs, 290 Ill. 36.

conveyance; and the maxim "*omnia praesumuntur contra spoliatores*" applies; the presumption is, as to the grantor and his heirs claiming under him, that the deed conveyed the highest degree of title—a fee simple.

The rule as to the certainty required in the proof, by parol, of lost or destroyed documents must be considered in connection with the maxim that everything will be presumed against the despoiler, otherwise the rule would often be the means of denying any relief to a complainant where the opposite party had destroyed the evidence against him.⁹¹

§ 1362. Sealing of Deeds Indispensable—The sealing of deeds was indispensable, at common law, in order to make them valid, and with the exception of a few States, the same is true in this country.

By the word deed as the same is here used is understood such instruments as purport to convey real estate or any interest therein. So although an instrument is called a deed, if it be not sealed it is not a deed, and on the other hand if the usual recital in regard to the affixing of the seal is omitted, yet if a seal be actually affixed it is a deed.

It is immaterial who affixes the seal, whether it be a party to the deed, or the scrivener, or a stranger, provided it is done before it is delivered by the maker. By delivering the deed the maker adopts the seal as his own. And it is competent for any number of grantors to adopt and make use of one and the same seal, and thereby adopt it as the seal of each of them.⁹²

A paper purporting to be a deed is not valid in this State for the purpose of conveying title unless it is under seal, yet where a person enters into possession under such a paper it is admissible in evidence for the purpose of showing the extent of his possession and what he claims by his possession. So an instrument, though not under seal,

⁹¹—Hudson v. Hudson, 287 Ill. 286. ⁹²—2 Wash. on Real Prop. 569.

is evidence of a sale, and shows that an equitable title has been conveyed to the person claiming as grantee thereunder.

Under a statute passed in 1909, in this State (Hurd's Stat. 1913, p. 557), it is provided that such a deed or paper, where the law of the State where executed dispenses with a seal or scroll, is given the same force and effect in this State, in law and equity, as if a seal or scroll had been affixed.⁹³

By the ancient common law and before learning became general, and when few only were able to write, sealing and delivering were the only requisites to its validity, but for the purpose of the more readily and certainly proving the fact, the names of persons present at its execution and cognizant of the fact, were endorsed upon the instrument by the scrivener, that they might be known and called as witnesses in case it should afterwards be denied by the grantor. But in process of time, when learning became more general and the art of writing common, it became the custom for the grantor, in addition to sealing, to sign his name to the instrument, and for the persons who were present at its execution to sign their names to the deed as witnesses, under the attesting clause. The law then required the attesting witnesses to be first called, as they were supposed to know more of the transaction than others, and also for the same reason that the parties had chosen them as the witnesses to that fact. And the courts held that the party relying on the deed could not resort to other evidence of its execution until he produced the attesting witnesses, and they denied its execution, or when it appeared that they could not be produced as witnesses, or if possible, that they would be incompetent or disqualified from testifying. If, when produced, they denied its execution, the party claiming under it might resort to other legitimate evidence to prove its execution.

93—Wilson v. Kruse, 270 Ill. 298.

When witnesses became disqualified by reason of interest, infancy, or otherwise, or had died, or could not be found, he was permitted to resort to independent evidence, which was evidence of the handwriting of the witnesses who had attested its execution, and when this was proved, the deed was admitted in evidence.

This is the generally received doctrine of the present time, and though some decisions may exist which seem to militate against it, as a rule it is firmly established.⁹⁴

However, the modern statutes of Illinois in regard to the acknowledgment of deed do away with the necessity of producing witnesses as to its execution, provided the deed is properly acknowledged. The law in regard to acknowledgments will be considered hereafter.

Although a party to a lease may be misnamed in the body of the writing, yet if he sign the lease, it is his contract no matter by what name he is called in the body of the instrument. So, where the lessee was named in the body of the lease as William W. Montayne, but his true name was Wiley W. Montayne, and he signed it as W. W. Montayne, then he is bound by the lease.⁹⁵

It is a fundamental principle that an instrument in order to pass the legal title to real property, must be under seal.⁹⁶

Where a deed is relied on for the purpose of conveying title to land it must be under seal, but a deed in other respects formal, purporting to convey lands, may be good color of title although not under seal. So where a deed without a seal was offered in evidence as color of title only, it was properly admitted.⁹⁷

§ 1363. Adopting and Affixing Seal—Where an instrument appears on its face to be a sealed instrument to be signed by all the parties thereto, and there appear to be

⁹⁴—Dundy v. Chambers, 23 Ill. 369.

⁹⁶—Barrett v. Hinkley, 124 Ill. 32.

⁹⁵—Montayne v. Wallahan, 84 Ill. 355.

⁹⁷—Sanitary District v. Allen, 178 Ill. 330.

several seals attached to the instrument, but not as many as there are signatures, the court will presume that each of the signers adopted some one of the seals as his seal.⁹⁸

It is not necessary that the scroll should be affixed by the signer. The printing of the scroll, or the characters representing a seal, is as legal and durable as if made with a pen by the signer himself, and it equally indicates the intention of the signer as to the character of the instrument. If the signer places his name opposite a scroll already made, he thereby adopts it, and makes it his own.⁹⁹

But when the issue is presented whether or not the document has been altered, and when, and by whom, by the addition of a seal, that issue might well be submitted to a jury.¹

§ 1364. Proof of Seal of Corporation—Where an instrument is executed by the proper officer of a corporation, the seal affixed affords *prima facie* evidence that it is the seal of the corporation. This rule does not dispense with evidence that the seal is the seal of the corporation, but adopts the rule of *prima facie* evidence that where an instrument is duly executed by one having authority, that the seal he attaches is the seal of the corporation, until it is impeached or shown to be otherwise.

It has been held that where it is shown that the seal attached to document is the seal of the corporation, and to have been set to the deed by the hands of an agent, it is *prima facie* evidence of his authority to do the act.

The ancient strictness of proof of the seal being the devise and seal adopted by the corporation, has been greatly relaxed. And this is, indeed, indispensable under the very great multitude of corporations of a public and private na-

98—*Jackson v. Security M. L. I. Co.*, 233 Ill. 161; *Davis v. Burton*, 4 Ill. 41; *McLean v. Wilson*, 4 Ill. 50; *Trogdon v. Cleveland Stove Co.*, 53 Ill. App. 206; *Eames v. Preston*, 20 Ill. 389.

99—*Doe v. McMahon*, 4 Ill. 12.

1—*Schwartz v. Herrenkind*, 26 Ill. 209.

ture which have become the most desirable and convenient mode of association of capital for the varied transactions in manufacturing, carrying and trading. It would in most instances be difficult, and in a great many cases impossible, for the persons with whom they deal, strangers to the proceedings of corporation boards, to prove that a particular device had been adopted by them as a seal. It may be that a stricter rule is required in England and some of the States, but the court refused to discuss the rule or its soundness in regard to the relaxation of proof in this regard.²

If a document is executed by a corporation by its president and secretary, with a scroll as its seal, and the corporation accepts the benefit of the document, and acts under it, this amounts on the part of the corporation to an adoption of the scroll, as its corporate seal. The legal presumption is, that where seals are affixed to a document that they are placed there as the seals of the parties.³

§ 1365. Court to Determine as to Seal—It is for the court to determine whether a document is under seal or not; and this is done by inspection by the court.⁴

§ 1366. Recitals as to Seals—The recital in a deed that it is executed under seal is unnecessary.⁵

And a recital in a document that it is under seal, where no seal is affixed, does not make it a sealed instrument.⁶

And the general rule is, that if there be no seal at the end of the instrument it will not be held to be a specialty, although the parties in the body of the deed refer to it as a sealed instrument.⁷

§ 1367. Seal Imports Consideration—A seal implies a valuable consideration, and there is no necessity of proving it; that is in proceedings at law.⁸

2—Phillips v. Coffee, 17 Ill. 154.

6—Vance v. Funk, 3 Ill. 263.

3—Conkey Co. v. Goldman, 125 Ill. App. 161.

7—Jackson v. Security M. L. I. Co., 233 Ill. 161.

4—Schwarz v. Herrenkind, 26 Ill. 209.

8—Chamberlain v. Fernbach, 118 Ill. App. 145; Randleman v. Randleman, 156 Ill. 568.

5—Chamberlain v. Fernbach, 118 Ill. App. 145.

It is presumptive evidence of a sufficient consideration to support a covenant to pay according to the covenant.⁹

§ 1368. **Scroll as Seal—Statute**—"That any instrument of writing, to which the maker shall affix a scroll by way of seal, shall be of the same effect and obligation, to all intents, as if the same were sealed."¹⁰

The word "seal" after the signature of the parties is as effectual as a scroll to an instrument, and makes it a sealed instrument.¹¹

So is a bracket, "(—)." ¹²

And so, also, are the letters "L. S." ¹³

§ 1369. **Seal Shown in Copy of Document**—Where a copy of a deed from the record is produced, having the word "seal" or a scroll representing a seal, it must be presumed that the seal to the original was such a one as the law requires. A fac-simile cannot be transferred from the record, and where such a representation appears in the copy, it will be held good until it is shown that a proper seal was not attached to the original.¹⁴

In making copies of sealed instruments, by long usage and the general understanding of legal writers, the letters "L. S." are regarded as the true representation of a seal.¹⁵

§ 1370. **Acceptance of Deed by Grantee**—To render a deed operative there must be an acceptance by the grantee. No particular form or ceremony is necessary to constitute an acceptance, but there must be satisfactory evidence that a grantee either actually accepted the deed, or sought to become the beneficiary under it, before any litigation occurs involving the question of acceptance. So where a husband,

9—Hite v. Wells, 17 Ill. 88; Evans v. Edwards, 26 Ill. 279; Forthman v. Deters, 206 Ill. 159; Adams v. Peabody Coal Co., 230 Ill. 469; Rupert v. Frauenknecht, 146 Ill. App. 397.

10—Sec. I, Ch. 29, R. S.

11—Jackson v. Security M. L. I. Co., 233 Ill. 161.

12—Eames v. Preston, 20 Ill. 389.

13—Doe v. McMahon, 4 Ill. 12; Bucklin v. Hasterlik, 155 Ill. 423.

14—Deininger v. McConnel, 41 Ill. 227.

15—Bucklen v. Hasterlik, 155 Ill. 423; Anthony v. International Bank, 93 Ill. 225.

before the married woman's act went into force, made a deed of the property to his wife direct, and recorded it, and she rented the property and collected the rents, and offered it for sale, it was held to be operative at least in equity.¹⁶

Accordingly it has been held that the recording of such a deed by the grantor without the knowledge or consent of the grantee does not constitute either a delivery or acceptance.

Under such circumstances the recording of the deed may afford *prima facie* evidence of delivery and acceptance, but if the deed creates any liability against the grantee or imposes any obligation upon him an acceptance cannot rest upon any presumption but the acceptance must be of an affirmative character.¹⁷

And where the acceptance is not proven, and the facts do not justify the presumption of law that the grantee has accepted the deed, the title does not pass.¹⁸

If a grantee in a deed running to him and the heirs of his body refuses to accept the deed, then no estate passes thereby, and the heirs have no interest under the deed in the premises therein described.¹⁹

Mere manual possession of a deed by a grantee is not necessarily an acceptance of the deed.²⁰

And where the grantee is *sui juris* there is *prima facie* no presumption of acceptance from the unauthorized acts of the grantor. Where a deed is for the benefit of the grantee, under certain circumstances acceptance may be presumed, but not necessarily. Even in the cases which treat the act of recording as *prima facie* evidence of delivery, it is held that such evidence is sufficiently rebutted by showing that the conveyance was intended to confer no benefit on the grantee.²¹

16—Bryan v. Wash, 7 Ill. (2 Gilm.) 557; Dale v. Lincoln, 62 Ill. 22; Merriman v. Schmitt, 211 Ill. 263.

17—Hill v. Kreiger, 250 Ill. 408.

18—Dagley v. Blake, 197 Ill. 53.

19—Spencer v. Spruell, 196 Ill. 119.

20—Newlin v. Prevo, 90 Ill. App. 515; Moore v. Flynn, 135 Ill. 74; Pratt v. Griffen, 184 Ill. 514.

21—Sullivan v. Eddy, 154 Ill. 199.

§ 1371. **Assent of Grantee to Unknown Deed**—It is true, as a general proposition, where nothing appears to show a contrary intention, that if the owner of an estate makes a conveyance of it and places the deed upon record without the knowledge of the grantee, the title will nevertheless pass, if the latter, on being informed of the transaction, assents to it.²²

§ 1372. **Acceptance by Grantee Presumed**—It is well settled, that a deed may operate by a presumed assent until dissent appears, and then it becomes inoperative, on the principle that a person cannot be made a grantee against his will and without his agreement.²³

In respect to a grantee who is not under legal disability, the rule is, that when such grantee is aware of the conveyance, and does not dissent, and the conveyance is positively beneficial to him, acceptance will be presumed, but that no such presumption will arise so long as the grantee is ignorant of the conveyance.²⁴

Where the deed is in the nature of a voluntary settlement and beneficial to the grantee its acceptance will be presumed, especially where the grantee is an infant.²⁵

The rule is that where the grantee is an infant the presumption of acceptance is a rule of law, and knowledge of the conveyance and of its acceptance is not necessary; but this is because the infant is incapable of doing any act in regard to the deed which he might not avoid on reaching his maturity, and it is the duty of the parent as his natural guardian, to accept and preserve the deed for him.²⁶

§ 1373. **Delivery of Deed Essential**—It has repeatedly been held that a delivery of a deed is essential to render it operative as a conveyance, and the delivery must be unconditional. A deed takes effect on delivery, or not at all.²⁷

22—*Chilvers v. Race*, 196 Ill. 71.

23—*Dale v. Lincoln*, 62 Ill. 22.

24—*Dagley v. Blake*, 197 Ill. 53.

25—*Spencer v. Razor*, 251 Ill. 278.

26—*McReynolds v. Stoats*, 288 Ill.

22.

27—*Byars v. Spencer*, 101 Ill. 429;

Roane v. Baker, 120 Ill. 308; *Blackman v. Preston*, 123 Ill. 381.

To constitute a valid delivery the grantor must part with all control over it.²⁸

A deed although duly executed, acknowledged and recorded, has no force until it is duly delivered. Therefore, one who receives a trust deed from the grantor therein named is bound by the record of conveyances in the grantor's chain of title, and takes subject to a conveyance of the property by deed duly recorded after the trust deed is recorded, but before it is duly delivered.²⁹

Delivery is the final act on the part of the grantor by which he consummates the purpose of his conveyance, and without it all other formalities which have preceded are impotent to render it effectual as an instrument of title.³⁰

§ 1374. Delivery of Deed a Question of Law and Fact—
In case of conflicting titles derived from the same source the question of the delivery of a deed is one both of law and of fact. From the evidence of the facts and circumstances surrounding the transaction is to be determined the legal question as to whether acts, declarations and circumstances constitute a legal delivery.³¹

Whether the facts in a particular case are sufficient to establish a delivery of a deed often present difficult questions to determine. The question of delivery is largely one of intention. The intention of the grantor is to be gathered from all the facts and circumstance connected with the transaction. Each case must be determined by the special facts of the particular case. To constitute a delivery it must clearly appear that it was the grantor's intention that the deed should pass title at the time and that he should lose control over it. If the deed is not actually delivered but is to become effective upon the happening of some future event there is no valid delivery. The intention to deliver on the one hand and of the acceptance on the other may be shown by direct evidence of the inten-

²⁸—*Jones v. Schmidt*, 290 Ill. 97.

³⁰—*Dagley v. Blake*, 197 Ill. 53.

²⁹—*Lanphere v. Desmond*, 187 Ill.

³¹—*Shults v. Shults*, 159 Ill. 654.

tion or may be presumed from acts and declarations of the parties. In like manner the presumption of a delivery may be rebutted and overcome by proof of a contrary intention by acts and declarations from which the contrary presumption arises.³²

In a contest, where the question of the delivery of the deed is in issue, the burden of proof is on the party who claims under the deed to show that it was delivered.³³

§ 1375. Sufficient Delivery—The question of what acts are necessary to constitute a sufficient delivery of a deed so as to render it operative in passing the title to land, has been the subject of much discussion in the Supreme Court, and it has been held that to determine whether there has been a delivery of a deed, it must appear, first, that the grantor intended to part with his title, and, second, that the control of the instrument passed beyond the control of grantor, that he lost all power over it.³⁴

Ordinarily giving the possession of the deed to the grantee with the intention that the custody of the deed should remain permanently with the grantee, or that the deed should be presently operative as a conveyance of land, is a sufficient delivery.³⁵

Where a deed has been actually delivered to the grantee in the lifetime of the grantor, even though it provides that it is not to take effect until after the grantor's death, it will be sustained as a present grant of a future interest.³⁶

If the grantor, with or without any previous agreement with the grantee, executes a deed and has it recorded, and notifies the grantee, who by words or acts accepts the conveyance, the delivery is sufficient, and the actual posses-

32—*Pemberton v. Krapar*, 289 Ill. 295.

33—*Oliver v. Oliver*, 149 Ill. 542.

34—*Byars v. Spencer*, 101 Ill. 429; *Roane v. Baker*, 120 Ill. 308; *Spacy v. Ritter*, 214 Ill. 266; *Shulta v. Shulta*, 159 Ill. 654.

35—*Hollenbeck v. Hollenbeck*, 185 Ill. 101.

36—*Phillips v. Gannon*, 246 Ill. 98; *Byars v. Spencer*, 101 Ill. 429.

sion of the instrument is not indispensable. And title having been thus conveyed, cannot be resumed by the grantor without the consent of the grantee.³⁷

While the recording of a deed would not be conclusive evidence of its delivery, the court has no hesitancy in saying that it constitutes *prima facie* evidence of such fact.³⁸

When a party acknowledges before an officer the execution of a deed made by him, and allows the officer without objection to hand the same to the grantee, this will amount to a delivery of the deed.³⁹

The delivery of a deed will be presumed from slight circumstances where there is proof of an intention of the grantor to convey to the grantee.

The manual transfer of a deed from the grantor to the grantee named therein and the subsequent possession thereof by the grantee may not in all cases amount to a delivery, and, on the other hand, a manual transfer of the possession of a deed from the grantor to the grantee is not always necessary to constitute a delivery in law. What amounts to a delivery depends upon the facts and circumstances of each particular case, and, as has often been stated by the courts, is a mixed question of law and facts.⁴⁰

§ 1376. **Insufficient Delivery of Deed**—If upon the execution of the deed, one of the grantors, the husband, delivers it to his wife, another of the grantors, to be by her held for the benefit of the grantees therein named, the deed cannot be held to have been delivered, for the reason it is always under the dominion and control of the grantors.⁴¹

To constitute a valid delivery of a deed the grantor must absolutely divest himself of all control over it, and if he

37—*Williams v. Williams*, 148 Ill. 428.

38—*Himes v. Keighblyngor*, 14 Ill. 469.

39—*Fletcher v. Shepherd*, 174 Ill. 262; *Phelan v. Hyland*, 197 Ill. 395;

Doan v. Hostetler, 215 Ill. 635; *Baker v. Hill*, 214 Ill. 364; *Loveland v. Loveland*, 136 Ill. 75; *Hewett v. Clark*, 91 Ill. 605.

40—*Kelly v. Babst*, 272 Ill. 237.

41—*Morris v. Caudle*, 178 Ill. 9.

retains any custody or control over it, or if it is not actually delivered, but is to become effective only upon the death of the grantor, there is no delivery. A deed must take effect upon its execution and delivery, or not at all.⁴²

Where the facts show that the grantor did not intend to lose control of the deed, and still continues to have control over the title without the consent of the grantee, there is not such a delivery as the law requires to render it a valid deed, and it cannot pass the title. So where a father made and acknowledged a deed to his son, and left it with the person who took the acknowledgment, with instructions to hold it and if he wanted it he would call for it, but if he died then to deliver it to the grantee, and the grantor afterwards mortgaged the land, it was held that there was not a sufficient delivery to pass the title to the premises described in the deed.⁴³

Although a deed may be placed upon record by the grantor, that is not conclusive evidence that he then delivered it absolutely or that he intended that it then should take effect, especially when the grantee is not present, and had no knowledge that it had been executed. If the grantor without the knowledge or consent of the grantee, place a deed upon record that will not constitute a delivery, for the reason that the grantee has not consented to receive it and it is well settled that it is essential to the legal operation of a deed that the grantee consent to receive it. Without acceptance on behalf of the grantee there can be no delivery. So where the grantor himself places the deed upon record, and after it is recorded he retains the possession and control of the instrument his rights in the property are not affected, although the deed may, without his consent, pass out of his control.⁴⁴

While the acknowledgment and recording of a deed may

42—Benner v. Baily, 234 Ill. 79.

44—Willenou v. Handlon, 207 Ill.

43—Byars v. Spencer, 101 Ill. 429;
Stinson v. Anderson, 96 Ill. 373.

104; Brown v. Brown, 167 Ill. 631.

afford *prima facie* evidence of its delivery and acceptance, this must be understood to apply to a deed simply conveying the premises, and not to a deed which imposes an obligation upon the grantee to assume and pay a pre-existing incumbrance on the property, and the insertion of such a clause is not sufficient of itself to charge the grantee with the payment of the incumbrance, it is necessary to go one step further and show that the grantee assented to the insertion of such a clause.⁴⁵

§ 1377. **Delivery a Question of Intent**—Delivery is a question of intent and depends upon the fact whether or not the parties at the time meant it to be a delivery to take effect at once. And the mere placing the deed in the hands of the grantor does not conclusively establish a delivery thereof. The intent of the grantor is the controlling element.⁴⁶

In such case the inquiry is, what was the intention of the parties at the time? and that intention, when discovered, must govern. The fact that a grantee in a deed may, after the execution of the instrument, take it into his hands, does not of itself establish a delivery.⁴⁷

The intention to deliver on the one hand, and the acceptance on the other, may be shown by direct evidence of the intention, or may be presumed from acts or declarations, or both acts and declarations, of the parties, constituting a part of the *res gestae*, which manifest such intention; in like manner the presumption of a delivery may be rebutted or overcome by proof of a contrary intention, or by acts and declarations from which a contrary presumption arises. It is not competent to control the effect of a deed by parol evidence when it has once taken effect by delivery, but it is always competent to show that the deed, although in the

45—Thompson v. Dearborn, 107 Ill. 87.

46—Hollenbeck v. Hollenbeck, 185 Ill. 101; Byars v. Spencer, 101 Ill. 429; Jordan v. Davis, 108 Ill. 336;

Latimer v. Latimer, 174 Ill. 418; Shults v. Shults, 159 Ill. 654.

47—Oswald v. Caldwell, 225 Ill. 224.

hands of the grantee, has never, in fact, been delivered, unless the grantor, or those claiming under him, are estopped in some way from asserting the non-delivery of the deed.⁴⁸

Where the act or acts of the grantor are relied on as evidence of the delivery of a deed, the test in each case is, the intention with which the act or acts, relied on as equivalent or substitute for a formal delivery, were done; and each case must, therefore, be judged by its facts and circumstances. The necessity of so doing and the varying conclusions drawn from different state of facts leads the court to regard it as difficult to fully harmonize the decisions on any well recognized principle. While this may be true in the sense that no two states of circumstances are exactly alike, yet certain principles upon which the conclusion must rest in each case are well established. In case an adult grantee, the acknowledgment and recording of a deed by the grantor and without his knowledge or consent, would not, of itself, amount to a delivery, but if, from all the circumstances, it appeared that the grantor by his acts intended to give effect and operation to the deed and relinquish all power and control over it, such acts would amount to a delivery. It may appear from the facts and circumstances that the grantor, in delivering the deed to the recorder to be recorded, intended to part with his title and that he delivered it for the benefit of the grantee, while under other circumstances no such presumption would arise. In the case of an ordinary deed of bargain and sale it is indispensable, whatever means may be adopted to accomplish its delivery, that the deed passes beyond the domination and control of the grantor, since both grantor and grantee cannot have control of the deed at the same time.⁴⁹

It is an essential prerequisite that the instrument should be understood by the parties to be completed and ready for

48—Price v. Hudson, 125 Ill. 284.

49—Hill v. Kreiger, 250 Ill. 408.

delivery, in order to have the mere placing it in the hands or possession of the grantee or his agent into a delivery.⁵⁰

A release deed releasing a trust deed or mortgage is valid though there may be no manual delivery thereof. The crucial test in all cases is the intent with which the act or acts relied on as the equivalent or substitute for a delivery are done. If the owner of an estate makes a conveyance of it and places the deed upon record, without the knowledge of the grantee, the title will nevertheless pass, if the grantee, on being informed of the transaction, assents to it.⁵¹

Where the owner of real estate made and executed a deed of the same to his infant grandchildren, reserving the use of the property during his life and the life of his wife, and he causes the deed to be placed in the hands of a third party to be taken care of, but gave no directions as to its delivery to the grantees, his previous statements to the custodian showed an intention that the grantees should have the property after his death, it was held that such statements, in connection with the fact that the grantor never took the deed from the custodian, but allowed it to remain with the custodian until his death showed that the delivery was intended for the grantees named therein.

And the fact that after his death his wife obtains the deed and destroys it, such destruction will not affect the question of the delivery of the deed. The property at the time the deed was made was the property of the grantor and not of his wife, and the custodian, if the agent of any one, was the agent of the grantor and not of his wife.⁵²

§ 1378. Conditional Delivery of Deed—If the delivery is conditional, or to take effect upon the happening of some event in the future, it must appear that the condition has been performed or that the event has happened. Any disposition of the deed by the grantor, with the intention

50—*Stiles v. Probst*, 69 Ill. 382.

52—*Douglas v. West*, 140 Ill. 455.

51—*Mann v. Jummel*, 183 Ill. 523.

thereby to make a delivery of it, so that it shall become presently effective as a conveyance of title, will, if accepted by the grantee, constitute a sufficient delivery.⁵³

§ 1379. Ratification of Delivery of Deed—A deed procured from the grantor without his intention of delivering it, so as to complete its execution, may subsequently be ratified by the grantor so that a good title may become vested in the grantee. This is upon the well settled principle that a subsequent ratification may have a retrospective effect.⁵⁴

While it is true that the declarations of the grantor made before or subsequent to the execution of the deed, are not admissible for the purpose of impeaching the deed, yet subsequent declarations of the grantor, which show that he was satisfied with the deed, have been held to be inadmissible.⁵⁵

A grantee in a deed is not affected by the declarations of his grantor made after the execution and delivery of the deed, unless, after full knowledge of such declarations, he acquiesces or sanctions them.⁵⁶

Where the conduct of the grantor, and all the circumstances, are such as indicate that the grantor intended to give effect and operation to the deed, and to relinquish all power and control over it, the law will give effect to the deed accordingly, and will hold that there has been a delivery of the deed.⁵⁷

After the grantor has become fully advised as to the facts in the case, he may by his acts and conduct so ratify the act of the grantee in recording the deed as to be bound thereby.⁵⁸

§ 1380. Delivery of Deed by Grantor to a Third Person—The question of the delivery of a deed is almost wholly one

53—Price v. Hudson; 125 Ill. 284.

54—Phelps v. Pratt, 225 Ill. 85;
Fitzgerald v. Allen, 240 Ill. 80.

55—Burt v. Quisenberry, 132 Ill.
385; Guild v. Hull, 127 Ill. 523.

56—Higgins v. White, 118 Ill. 619.

57—Weber v. Christen, 121 Ill. 91.

58—Phelps v. Pratt, 225 Ill. 85.

of intention. It is only necessary that the intention of the grantor be clearly manifested that the deed shall become operative immediately and that he surrenders all control and dominion over it. In this state it is well settled that where a grantor executes a deed and places it in the hands of a third person to be delivered unconditionally to the grantee upon the death of the grantor, and the grantor surrenders all control and dominion over it, such acts constitute a valid delivery. And it is just as well settled that such conveyances are not open to objection that they are in the nature of testamentary dispositions and void unless executed with the formality required by the Statute of Wills. Such a deed takes effect, not at the time of the death of the grantor, but immediately upon being delivered in escrow, if such act is attended with circumstances clearly evincing such intention on the part of the grantor.

And the reservation of a life estate in the grantor raises a strong presumption that it is the intention that the title should vest immediately in the remainderman, for the reason that if such intention had not existed there would be no reason for the reservation. In case such a deed is placed in the hands of a third person to be delivered to the grantee on the death of the grantor the escrow holder holds the deed, not as the agent of the grantor, but as the agent of the grantee named in the deed and on his behalf.⁵⁹

A subsequent change or intention on the part of the grantors could not affect the delivery thus completed, and even a mental reservation on the part of the grantors contrary to that expressed by their words and deeds, would not invalidate the delivery effected by their act and the words actually used. The custodian on the receipt of the deeds with the instructions of the grantors holds them for the benefit of the grantees, and he has no right to surrender

⁵⁹—*German-American Bank v. Martin*, 277 Ill. 628; *Vaughn v. Vaughn*, 272 Ill. 11; *Fleming v. Reheis*, 275 Ill. 132; *Latimer v. Latimer*, 174 Ill.

418; *Thurston v. Tubbs*, 257 Ill. 465; *Bullard v. Suedmeier*, 291 Ill. 400; *Moore v. Downing*, 289 Ill. 612.

them to the grantors and the grantors had no right to receive them.⁶⁰

If the delivery is made to the agent of the grantee, or to a stranger, for and in behalf of the grantee, and to his use, it is a good delivery although the grantee may in truth be entirely ignorant of the conveyance, for, if the delivery be absolute, the assent of the grantee is presumed from the fact that the conveyance is beneficial to him. And such a delivery is not an escrow.

In such cases, however, the delivery must be unconditional, and for the express purpose of vesting title in the grantee. The cases show that the deed takes effect from the first delivery, no matter when it comes into the hands of the grantee, or even if it never does.⁶¹

But it has been held that when a grantor executes a deed, and delivers it to a third person to be delivered to the grantee upon the payment of a certain sum of money, or upon the happening of some future event, it is not the grantee's deed until the second delivery.⁶²

And although the custodian may put and keep the deed in a receptacle belonging to the grantor, and where he could, by the exercise of physical power, regain the actual possession of the instrument as against such custodian, it cannot be said that the grantor did not part with the dominion and control of the deed. Where the grantor once parts with the power and control of the instrument, it is gone forever, and he cannot thereafter rightfully or effectually resume control over that which he had parted with, even if he should obtain possession of the deed.⁶³

§ 1381. Deposit of Deed to Be Delivered on Uncertain Event—By all the authorities a deed deposited with a third

60—Hudson v. Hudson, 287 Ill. 286.

61—Bryan v. Wash, 7 Ill. (2 Gilm.) 557; Shea v. Murphy, 164 Ill. 614; Clark v. Harper, 215 Ill. 24; Kelly v. Parker, 181 Ill. 49; Chapin v. Nott, 203 Ill. 341.

62—Fitch v. Miller, 200 Ill. 170; Citing: Demesmey v. Gravelin, 56 Ill. 95; Skinner v. Baker, 79 Ill. 496; Stanley v. Valentine, 79 Ill. 544.

63—Munro v. Bowles, 187 Ill. 346.

person to be delivered upon the happening of some event in the future which is uncertain and may or may not happen, does not pass the title to the land described in the deed to the grantee until such event occurs and then only from the happening of the event, or perhaps, from the actual delivery of the deed to the grantee after the event has occurred.

There may be exceptions to this rule, as where a man delivers his deed in escrow, and dies before the condition of the deposit is fulfilled. In such case it has been held from necessity that the condition had been fulfilled, the deed must take effect by relation as to the time of the first delivery.⁶⁴

§ 1382. Wrongful Delivery of Deed by Depository—It has been uniformly held by all courts that where a deed has been left by the grantor with a depository to be delivered to the person therein named as grantee upon his compliance with certain conditions and agreements, the unauthorized delivery by the depository before the performance of the conditions or agreements conveys no title, and an innocent purchaser through such grantee is no more entitled to protection than in the case of a forgery. This is especially true where the grantor is not guilty of any negligent conduct that would require the court to compel the grantor to suffer the loss rather than the innocent purchaser.⁶⁵

§ 1383. Delivery of Deed to Agent of Grantor—But where the grantor in a deed hands it to a party acting as his agent, to be delivered to the grantee, the possession of the agent is, in law, the possession of the grantor. Such an act on the part of the grantor is not a parting with the instrument with the intention of relinquishing all dominion over it, but it is merely putting it in the hands of an agent, and until the agent, thus charged with the duty of making the delivery, actually delivers the deed, the instrument is

⁶⁴—*Main v. Pratt*, 276 Ill. 218.

⁶⁵—*Forcum v. Brown*, 251 Ill. 301.

no more operative than it would have been if it had remained in the personal custody of the grantor.⁶⁶

So where a grantor executed a deed and delivered it to a third person with instruction to hold it till called for, and if not called for before the death of the grantor, then to deliver it to the grantee, it was held that there was no delivery.⁶⁷

The delivery by the grantor to his agent without any direction of instruction as to its delivery to the grantee, does not authorize the agent to deliver the deed to the grantee after the death of the grantor.⁶⁸

Merely executing the deed and placing it on record by the grantor, without the knowledge of the grantee, is not of itself a delivery. However, in such case, the subsequent assent of the grantee will be sufficient.⁶⁹

Where the grantor delivers the deed to his attorney, with instructions to deliver the deed to the grantee after the marriage of the grantor to the grantee, Held that such a delivery did not constitute a delivery to the grantee; that the possession of the attorney was the possession of the grantor, who did not part with all power and control over the deed.⁷⁰

§ 1384. Notice of Delivery of Unrecorded Deed—Whether a deed from a father to a son conveying the property therein described, but reserving a life estate in the father, and delivered by the father to a third person with directions to hold the same and deliver it to the grantee on the death of the father, and the possession of the property is delivered to the son, is void as to subsequent creditors depends wholly whether the subsequent creditor had actual or constructive notice of the execution of delivery of the deed. The provision of Section 30 of the Conveyance Act makes all unrecorded deeds void as to subsequent purchas-

66—Dagley v. Blake, 197 Ill. 53.

67—Spacy v. Ritter, 214 Ill. 266.

68—Lange v. Cullinan, 205 Ill. 365.

69—Byars v. Spencer, 101 Ill. 429.

70—Barrows v. Barrows, 138 Ill.

649.

ers and creditors of the grantor without notice thereof until the same is filed for record. This section places subsequent creditors on the same footing as subsequent purchasers. The question then arises, what facts are sufficient to put a party on inquiry, and to show notice as to the execution and delivery of an unrecorded deed. It is to be remarked that each case is governed by its own particular facts. While it is sometimes difficult to determine what facts are sufficient to put a party upon inquiry there has never been any departure from the rule early established in this state: "Where the court is satisfied that the subsequent purchaser acted in bad faith, and that he either had actual notice or might have had that notice, had he not wilfully and negligently shut his eyes against those lights which with proper observation would have led him to knowledge, he must suffer the consequences of his ignorance, and be held to have had notice so as to taint the purchase with fraud in law. It is sufficient if the channels which would have led him to the truth were open before him, and his attention so directed that they would have been seen by a man of ordinary prudence and caution, and notify him that he was liable to suffer in consequence of his ignorance. The law will not suffer him to shut his eyes when his ignorance is to benefit himself at the expense of another, when he would have had them open and inquiring had the consequences of his ignorance been detrimental to himself and advantageous to another." This rule has been consistently followed, repeatedly reaffirmed and never departed from.⁷¹

As a part of this rule the courts have uniformly held that the actual occupancy of the land is equal to the record of the deed or other conveyance under which the occupant claims title or right; the purchaser is bound to inquire by

71—*German-American Bank v. Martin*, 277 Ill. 628; *Rupert v. Mark*, 41. Ill. 486; *Morrison v. Miles*, 270 Ill. 15 Ill. 540; *Merrick v. Wallace*, 19

what right or title he holds, and that the open, visible possession of premises is sufficient to charge the purchaser with notice of all legal or equitable claims of the occupant.⁷²

And further, it has been held that whatever is sufficient to put a party upon inquiry which would lead to the truth is in all respects equal to and must be regarded as notice. One having notice of such facts as would put a prudent man on inquiry is chargeable with notice of other facts which might have been discovered on diligent inquiry.⁷³

A purchaser may not excuse himself by merely obtaining information of the character in which the possession was originally obtained, but is bound to inquire of the person in possession by what tenure he holds possession and what interest he claims in the premises.⁷⁴

§ 1385. Valid and Enforceable Contract Essential to Valid Delivery—Where, however, there is a delivery of a deed by the grantor to a third person in pursuance of, and as a part of, a parol contract between the grantor and grantee in the deed for the sale by the grantor to the grantee of the land described in the deed, the question whether or not the grantor lost control over the instrument so deposited with the third party depends upon the validity or enforceability of the contract and not upon the intention of the parties.

But before a grantee can claim right or title to the land described in such a deed he must show that the grantor has made a valid and binding contract to sell and convey the land; and such a contract can only be evidenced by a written note or memorandum thereof expressing the condition and subscribed by the grantor. It may appear in some of the cases that the grantor permitted the deed to be delivered to the grantee by the depository upon the performance of the parol conditions of the deposit. Undoubtedly,

72—Coari v. Olsen, 91 Ill. 273;
Brown v. Gaffney, 28 Ill. 149; Mer-
chants Bank v. Dawdy, 230 Ill. 199.

73—Blake v. Blake, 260 Ill. 70.

74—Williams v. Brown, 14 Ill. 200;
German-American Bank v. Martin,
277 Ill. 628.

the final delivery of the deed to the grantee, in such cases, passes the title to the grantee.

But not a single case is found that where it has been held that one who has deposited a deed of lands to a third person with directions to deliver it to the grantee on the happening of a given event, but who has not made any valid executory contract to convey the land, may not recall the directions to the depository and recall the deed at any time before the conditions of the deposit have been complied with, provided these conditions are such that the title does not pass at once to the grantee upon the delivery of the deed to the depository.⁷⁵

§ 1386. Form or Ceremony of Delivery—No particular form or ceremony is necessary to constitute a delivery. It may be by acts without words, or by words without acts, or by both. Anything which clearly manifests the intention of the grantor, and the person to whom it is delivered, that the deed shall presently become operative and effectual, that the grantor loses all control over it, and by it the grantee becomes possessed of the estate, constitutes a sufficient delivery.⁷⁶

§ 1387. Presumptions as to Delivery of Deed—When a deed duly executed, is found in the hands of the grantee, there is a strong presumption that it has been delivered, and only clear and convincing evidence can overcome the presumption. Otherwise, titles could easily be defeated, and no one would be regarded as being secure in the ownership of land. It cannot be that a grantor may assail a conveyance many years after a deed has been made by merely swearing that he never delivered the deed. The unsupported evidence of the grantor surely will not be permitted to have such an effect. To so hold would render all titles insecure, and would be disastrous in the extreme.⁷⁷

75—*Main v. Pratt*, 276 Ill. 218.

77—*Tunison v. Chamblin*, 88 Ill.

76—*Oliver v. Oliver*, 149 Ill. 542; 376; *Blake v. Ogden*, 223 Ill. 204; *Bryan v. Wash.*, 7 Ill. (2 Gilm.) 557. *Delfosse v. Delfosse*, 287 Ill. 251.

In such case there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. The burden of proof is cast upon the party denying the fact of delivery.⁷⁸

Where the evidence shows conclusively, not only that the deed was recorded with the knowledge and consent of the grantee, and after it was recorded, was found in the possession of the grantee, but also that, after its execution the grantor therein expressed his satisfaction with what he had done, and announced that it was his intention thereby to give the property to the grantee, the law will presume a delivery of the deed, and that title passed thereby.⁷⁹

And only clear and convincing evidence to the contrary will overcome such presumption.⁸⁰

§ 1388. Presumption of Delivery May Be Rebutted—

While some cases hold that the execution, acknowledgment and recording a deed will raise the presumption of a delivery of a deed, the presumption is never held to be conclusive, and in the latter cases the decisions of the courts are to the effect that in the case of an adult grantee they do not of themselves prove delivery, especially if the acts done are without the knowledge of the grantee.⁸¹

But the fact that a deed was acknowledged and recorded is presumptive evidence of its delivery is liable to be rebutted. And it is successfully rebutted when it is shown that it was not in the nature of a family settlement, nor a gift to a minor, but was intended to confer no benefit upon the grantee, and its execution and recording were wholly unknown to him until after the death of the grantor.⁸²

And it is rebutted when it appears that the grantee never

78—*Harshbarger v. Carroll*, 163 Ill. 636; *Dale v. Lincoln*, 62 Ill. 22; *Dunlop v. Lamb*, 182 Ill. 319; *Inman v. Swearingen*, 198 Ill. 437.

79—*Shields v. Bush*, 189 Ill. 534; *Ackman v. Potter*, 239 Ill. 578; *McReynolds v. Stoats*, 288 Ill. 22.

80—*Schroeder v. Smith*, 249 Ill. 574.

81—*Sullivan v. Eddy*, 154 Ill. 199.

82—*Chilvers v. Race*, 196 Ill. 71.

knew anything about the deed, never had possession of it nor of the land, and after the deed was recorded the grantor remained in possession and control of the land up to the time of his death.⁸³

§ 1389. Delivery of Deed in Escrow—An escrow has been defined to be a written instrument which by its terms imports a legal obligation, and which is deposited by the grantor, promisor or obligor, or his agent, with a stranger or third party, to be kept by the depository till the performance of a condition or the happening of a certain event and then to be delivered over to the grantee, promisee or obligee. The authorities lay down the general rule that in order that an instrument may operate as an escrow there must be a valid contract between the principal parties as to the subject matter of the instrument and the delivery, and that in the absence of such a contract the party making the delivery may recall the instrument.⁸⁴

The intention of the grantor is the controlling element in respect to the sufficiency of the delivery of the deed in escrow. The question of such delivery is both one of law and fact, and from the facts and circumstances of the transaction the legal question as to the delivery is to be determined.⁸⁵

A deed cannot be delivered to the grantee as an escrow. While the law presumes more in favor of a deed, as to its delivery, in cases of voluntary settlements than in cases of bargain and sale, yet the presumption of delivery may be rebutted and overcome by proof of a contrary intention, or acts and declarations from which a contrary presumption arises.⁸⁶

A delivery in escrow requires that the deed be absolutely delivered—that is, it must pass beyond the dominion of the grantor. The delivery to a third party in escrow, in order that it may be sufficient to vest title in the grantee

83—*Kirby v. Kirby*, 236 Ill. 255.

84—*Main v. Pratt*, 276 Ill. 218.

85—*Fitzgerald v. Allen*, 240 Ill. 80.

86—*Benner v. Bailey*, 234 Ill. 79.

must be such as to deprive the grantor of all control over it.⁸⁷

If the grantor by his acts of delivery to a third person of the deed to be held by him in escrow, loses all control over the instrument, and by it the grantee is to become possessed of the estate, then there is a sufficient delivery. The question is to be determined largely by the intention of the grantor, which may be ascertained by his acts and declarations and by the circumstances attending the execution of the deed, and its delivery to a third party.⁸⁸

Where the grantor executes and delivers a deed to the agent of the grantee to be delivered to the grantee when he shall have executed and delivered a certain bill of sale of certain goods, the grantor thereby makes the party to whom the deed was delivered his agent to hold the deed, or else as a holder of the deed in escrow for both parties.⁸⁹

A deed delivered in escrow does not take effect till the condition is performed, except where the operation of the conveyance would be absolutely defeated unless the first delivery should be permitted to have effect, as in the case of the death of the grantor before the condition is performed. So where a deed of lands was delivered in escrow, and an absolute delivery was afterwards made, but previous to the second delivery a judgment was recovered against the grantor, under which the land was sold, it was held that the purchaser under the judgment was entitled to the land.⁹⁰

It may be true that where a deed is delivered to a third party, to be held by him in escrow until the grantee shall perform certain conditions agreed upon by the grantor and the grantee, the strict title does not pass, under such a transaction until the conditions are performed. But upon a fulfillment of the conditions by the grantee, the rights of

87—*Elliott v. Murray*, 225 Ill. 107.

88—*Shults v. Shults*, 159 Ill. 654.

89—*Draper v. Hoops*, 135 Ill. App.

90—*Jackson v. Rowland*, 6 Wend.

(N. Y.) 666.

the grantee must be considered as relating back to the time of the delivery of the deed to the holder of the escrow.⁹¹

When a deed is deposited as an escrow, it is nothing more than a mere scroll, until the condition is performed, which makes its delivery obligatory. Prior to that time no title passes without the grantor's consent. The grantee can only acquire title by the performance of the condition, or the happening of the contingency, and where these never happen the grantee never acquires any title.⁹²

§ 1390. **The Effect of a Delivery of a Deed**, provided it is accepted by the grantee, is to pass the title to the premises.

After the execution and delivery of a deed, it is not within the power of the grantor to repudiate it, and attempt to regain the property.⁹³

If a deed be once delivered, it cannot, if valid, be defeated by any subsequent act, unless it be by virtue of some condition contained in the deed itself. Regularly, there can be but one delivery of the same deed, for if the first is effectual, the second can be of no avail. The reason is, that by the first delivery it took effect.⁹⁴

After the actual delivery of a deed to the grantee and its record, the retention of its possession by the grantor in case the deed provides that the grantor shall receive the rents during his life, is not inconsistent with the delivery of the deed.⁹⁵

The fact that a deed is not to be recorded till after the death of the grantor does not affect the question of its delivery.⁹⁶

In a deed duly delivered containing covenants of warranty, but including this clause: "This deed is not to take effect until after my decease—not to be recorded until after my decease," it was held to be a good and valid deed,

91—Gudgel v. Kitterman, 108 Ill.

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92—Fitch v. Miller, 200 Ill. 170.

93—Spencer v. Razor, 251 Ill. 278;
Poffler v. Barringer, 236 Ill. 224.

94—Stiles v. Probst, 69 Ill. 382.

95—Williams v. Evans, 154 Ill. 98.

96—Kelly v. Parker, 181 Ill. 49.

without creating an intermediate estate to support it, livery of seizin having been abolished in this state.⁹⁷

§ 1391. Delivery and Acceptance in Cases of Voluntary Settlements—Where the deeds are of the character of voluntary settlements upon the grantees, the law presumes much more in favor of a delivery than it does in ordinary business transactions. Such a settlement, when fairly made, is binding on the grantor, unless there be clear and decisive proof that he never parted or intended to part with the possession of the deed, and it will be regarded as delivered although he retains it, unless there are other circumstances to show that it was not intended to be absolute. The rule in such cases results from the presumed intention of the grantor to make his act effectual, the relation of the parties to each other and the trust and confidence reposed. If the grantee knows of the conveyance an acceptance will be presumed, in the absence of other proof, on account of the beneficial nature of the gift. It would naturally be inferred that one would consent to and accept conveyance for his benefit. The law adds the presumption of delivery and acceptance where a voluntary conveyance is made to an infant or one under disability. The actual delivery and acceptance by such a grantee is never necessary. An infant is incapable of doing any act in regard to a deed which he may not avoid on reaching his majority, and it was not unnatural for one sustaining the relation of grandparent, where he has made a conveyance to his minor grandchildren, to preserve the deed for their benefit. As an infant or one under disability is incapable of making any formal and valid acceptance, his knowledge of the conveyance is not necessary, and it is the duty of the court to declare an acceptance for him where the conveyance is beneficial. The grantor's intention to presently vest the title in the grantee in the case of a voluntary settlement is regarded as of more importance than the mere manual possession of the deed,

⁹⁷—*Shackelton v. Sebree*, 86 Ill.

and in the case of a conveyance to an infant the recording of a deed by the grantor or by his direction is *prima facie* evidence of a delivery.

§ 1392. **Presumption of Delivery in Voluntary Settlements**—Where the grantor in a deed made as a voluntary settlement, reserves a life estate in the property described therein and its possession and control, the retention of the deed is not inconsistent with the idea of delivery, and the deed is operative. Such a reservation raises the presumption that the deed was intended to operate immediately as a conveyance of a future estate, which is to vest in possession at the termination of the life estate, since there would be no objection in reserving a life estate if the deed was not to be effectual as a conveyance or was retained to prevent its taking effect until the death of the grantor.⁹⁸

In cases of voluntary settlement the mere fact that the grantor retains the deed in his possession is not conclusive against its validity, if there are no other circumstances, besides the mere fact of his retaining it, to show that it was not intended to be absolute. The above rule, which was early announced by the Supreme Court, has been uniformly followed down to the present time.⁹⁹

The same degree of formality is never required, on account of the great degree of confidence which the parties are presumed to have in each other, and the inability of the grantee, frequently, to take care of his own interest. The presumption of the law is in favor of the delivery, and the burden of proof is on the grantor to show clearly that there was not a delivery.¹

In cases of voluntary settlements the deed may be delivered to a third party for the use and benefit of the grantee and such delivery will be effectual.²

98—Hill v. Kreiger, 250 Ill. 408.

2—Crabtree v. Crabtree, 159 Ill.

99—White v. Willard, 232 Ill. 464. 342.

1—Bryan v. Wash, 7 Ill. (2 Gilm.)

557; Masterson v. Cheek, 23 Ill. 72;

Chilvers v. Race, 196 Ill. 711.

The law makes stronger presumption of the delivery of a deed in the case of voluntary settlements than in cases of ordinary bargain and sale, but where the grantees are of full age, the presumption of delivery in their favor does not obtain to the extent it would if they were minors.³

It is well settled by adjudicated cases that the law presumes much more in favor of the delivery of a deed of voluntary settlement than an ordinary bargain and sale, and this is especially true where the grantee is an infant.⁴

In the case of a deed from a father to his infant child the burden of proof as to the delivery of the deed shifts, and it is required that any one claiming adversely to such grantee must show that there was no delivery.⁵

While the presumption is that a deed has been delivered in case of a voluntary settlement by a parent to a child in which there is a reservation of a life estate in the parent, the presumption may be rebutted by showing that it was the intention of the grantor not to deliver the deed. This presumption is applied and the validity of the deed is upheld only in cases where there are no circumstances to show that the grantor did not intend the deed to operate immediately.⁶

§ 1393. Time of Delivery of Deed—It is believed that the rule is well established, that the presumption must be indulged that a deed was delivered at the time it bears date. It may be averred and proved that it was delivered on a different day; but the presumption is that it was on the same day, and that presumption must stand until the contrary is proved.⁷

In order to rebut the presumption of the delivery of the deed at the day of its date, it is necessary to produce some

3—Ackman v. Potter, 239 Ill. 578;
Latimer v. Latimer, 174 Ill. 418;
Cline v. Jones, 111 Ill. 563; Bryan
v. Wash, 2 Gilm. 557; Reed v. Dou-
thit, 62 Ill. 348.

4—Jones v. Schmidt, 290 Ill. 97.

5—Thurston v. Tubbs, 257 Ill. 465.

6—Neffts v. Neffts, 290 Ill. 36;
Sample v. Geathard, 281 Ill. 79.

7—Deininger v. McConnell, 41 Ill.
227; Hardin v. Crate, 78 Ill. 533.

evidence as to the time of its delivery, and where no evidence of that time is produced, the presumption is not overcome.⁸

§ 1393a. The Doctrine of Relation of Conveyances Back to the First Cause—While it is true that in general a deed only takes effect from and at the time of its delivery and acceptance by the grantee, there are certain exceptions or modifications of that rule, known as the doctrine of relation. It is said that the doctrine of relation, applied to protect purchasers, is this, that where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other acts shall have relation. There is no rule better founded in law, reason or convenience than this, that all the several parts or ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation.

The fiction of the doctrine of relation is, that an intermediate bona fide alienee of an incipient interest may claim that a conveyance of the legal title to his grantor inures to this benefit by an *ex post facto* operation, and receives the same protection at law that a court of equity would afford him.

So it was held that where land had been purchased at a sale of school lands, and the purchase price paid therefor, but before the issuing of a deed, the purchaser quitclaimed his interest in the land, it was held in substance that the deed or patent issued to the purchaser inured to the benefit of the grantee in the quitclaim deed.⁹

And it has also been held that for the advancement of a right and the furtherance of justice, and where the rights of third parties are not injuriously affected, a deed will have relation back to, and take effect from the time the grantee was entitled to receive it. Thus a deed may relate

⁸—*Lake Erie & W. R. R. Co. v. Whitham*, 155 Ill. 514.

⁹—*Welch v. Dutton*, 79 Ill. 465.

back to avoid the effects of an adverse possession between the conclusion of the sale and the execution of the deed; or to render valid an intermediate alienation by the grantee; or to pass whatever interest the judgment debtor had in the land at the time of the attachment of the judgment lien.¹⁰

§ 1394. Destruction or Re-Delivery to Grantor of Unrecorded Deed—Where a conveyance of land is executed and delivered to the grantee, its subsequent destruction before recording the same will not re-invest the legal title in the grantor.¹¹

The delivery back by the grantee to the grantor of an unrecorded deed will not in any manner affect the title to the land; the legal title will still remain in the grantee.¹²

But it has been held by the Supreme Court in several cases that if the grantee in surrendering an unrecorded deed that has been executed and delivered to him, does so with the intention, or with the request, that it be destroyed, for the purpose of re-investing the title in the grantor, then the grantor acquires an equitable, though not a legal, title to the land.¹³

It would seem, however, that this rule applies only where the grantor remains in possession of the property.¹⁴

The burden of proof will be upon the grantor to show that the deed was surrendered with the intention that it should be destroyed and the title reinvested in the grantor.

So where it appears from the evidence that a widow, and those advising her, believed that the re-delivery of a deed to her by her husband conveying certain property to her,

10—Ferguson v. Miles, 8 Ill. (3 Gilm.) 358; Goff v. O'Connor, 16 Ill. 421; McHany v. Schenk, 88 Ill. 357; Keith v. Keith, 104 Ill. 397; Chicago, B. & Q. R. R. Co. v. Chamberlain, 84 Ill. 333.

11—Fletcher v. Shepherd, 174 Ill. 262; Clark v. Harper, 215 Ill. 24.

12—Crossman v. Keister, 223 Ill. 69; Gillispie v. Gillispie, 159 Ill. 84; Ward v. Conklin, 232 Ill. 553.

13—Happ v. Happ, 156 Ill. 183; Sanford v. Finkle, 112 Ill. 146; Gillispie v. Gillispie, 159 Ill. 84.

14—Fletcher v. Shepherd, 174 Ill. 262.

and the destruction of such deed by the husband, without her knowledge or consent, destroyed all her rights under the deed, she is not estopped from claiming ownership of the property by the fact that she had filed a petition for the assignment of dower and homestead in the property. The doctrine of estoppel in pais, or equitable estoppel, is based upon a fraudulent purpose, and a fraudulent result. If, therefore, the element of fraud is wanting there is no estoppel. There must be a deception, and change of conduct as a consequence, in order to estop the party from showing the truth.¹⁵

§ 1395. **Fraud in the Execution of Conveyances**—Fraud touching the execution of an instrument, such as misreading, the fraudulent substitution of one paper for another, or by obtaining by some trick or device an instrument which the party did not intend to execute, may be availed of in a defense in an action at law on the instrument. But if a party who executed a written instrument, understanding at the time what he was signing, desires to avoid the legal effect of the writing on the ground that he was induced to sign it by misrepresentations, false statements and deceit as to the nature, extent and value of the consideration, made by one who occupied a fiduciary relation to him, he must resort to a court of equity for a decree reforming or setting aside the instrument.

This is the rule in all jurisdictions where the distinction between law and equity is retained. An exception to the rule exists, by express statutory provisions, where it is desired to question the consideration of a negotiable instrument for the payment of money or property.

Courts of equity have long entertained bills brought to investigate alleged fraudulent conduct in transactions between client and counsel, and to declare such transaction void on the ground of constructive fraud if found to be unfair or obtained by undue advantage.¹⁶

15—*Gillispie v. Gillispie*, 159 Ill. 84.

16—*Robinson v. Sharp*, 201 Ill. 86.

In the case of *Sparrow v. Wilcox*, 272 Ill. 632, which is somewhat peculiar, it appeared that the complainants (*Sparrow, et al.*) were the owners of certain property in the City of Chicago, and a sale thereof was effected to one Garrett. The consideration for the conveyance was three notes of Garrett for \$2,500 each, and as collateral security therefor Garrett transferred to the complainants what purported to be two notes for \$3,200 each purporting to be executed by one Gunderson, which notes were purported to be secured by a mortgage on certain lands in Montana; at the same time Garrett delivered to the complainants what purported to be an abstract of title to the Montana lands showing the title thereto to be good in Gunderson. The deed from the complainants to Garrett was dated December 23, 1913, and was recorded December 30, 1913. On May 22, 1913, the defendants (*Counselman et al.*) recovered a judgment against Garrett for \$7,030.80, upon which an execution was duly issued but returned unsatisfied.

On April 3, 1914, Garrett conveyed the property to one Wilcox in consideration of the discharge of a pre-existing debt due from Garrett to Wilcox.

It was shown that what purported to be the notes of Gunderson and the abstract of title to the Montana lands were forgeries, and that was evidence that Gunderson was a myth; at the time the complainants conveyed the property to Garrett, he submitted to the complainants an affidavit showing that he was a man of means with assets of the value of over \$225,000, and liabilities of only \$15,000. On October, 1913, an involuntary petition in bankruptcy was filed against Garrett and his partner, and they were adjudged bankrupts on November 3, 1913.

On July 20, 1914, the complainants filed their bill against Garrett, Wilcox, Counselman and others to set aside the deed from them to Garrett, and the deed from Garrett to Wilcox, on the ground of fraud, deceit and falsehood and misrepresentation of Garrett as to his financial worth, and

setting up in the bill that the notes and mortgage purporting to be signed by Gunderson were not his genuine notes and mortgage and that the abstract of title to the lands covered by the mortgage was not genuine; that the complainants relied upon the representations made by Garrett as to his financial worth, which representations were wholly false and untrue, and that the consideration for the deed from them to Garrett had wholly failed. The bill alleged that certain of the defendants claimed some interest in the premises as judgment creditors; that such interest, if any, was subordinate to that of the complainants, and prayed for a cancellation of the deed from them to Garrett, and of the deed from Garrett to Wilcox. The defendants (Counselman et al.) filed an answer to the bill, calling for strict proof as to the frauds perpetrated by Garrett, and set up the lien of their judgment against Garrett and the property as superior to the rights of the complainants.

On the report of the Master the court entered a decree setting aside the deeds from the complainants to Garrett, and the deed from him to Wilcox, restoring the fee title to the complainants. From this decree the defendants, Counselmen et al., appealed, but Wilcox and the Central Trust Co. (trustee in bankruptcy), who had answered bill, did not join in the appeal.

It was urged by the appellants, in the Supreme Court, that they were judgment creditors of Garrett without notice, actual or constructive, of any claims of the appellees, and their judgment lien and the rights arising therefrom were superior to any alleged equities of the appellees. It was contended by the appellants that under section 30 of the Conveyance Act they are in the same position and entitled to the same rights as bona fide purchasers of the property in question for value and without notice, and that, even if the deed can be cancelled for fraud duly proved, they are still entitled to their rights as judgment creditors of record. In reply to this position of the appellants the

court says that while it is not claimed that the appellants had actual or constructive notice of any claims of the appellees in the premises and there is no dispute as to the validity of the judgment obtained by the appellants, the court is of the opinion that said section 30 does not apply. If the appellants had recovered a judgment against the appellees prior to the recording of the deed from them to Garrett, although the deed was of prior date, they would be entitled to their judgment lien against the property as against the grantee in the deed, and it is to cases of that kind that section 30 of the Conveyance refers. But any rights which the appellants are entitled to have accrued under section 1 of the chapter on Judgments and Executions.

It is undoubtedly true that a judgment will attach to the after acquired real estate of the judgment debtor, but the simple question here is, whether a judgment creditor, in such case, takes his judgment lien as to existing equities against the judgment debtor or not. No decisions of the Supreme Court have been shown where the exact question involved has been passed upon, and no reason occurs to the court why a judgment creditor under such circumstances should be given a greater right to the property of a judgment debtor than he himself has. If a proper case arises by which a grantor in a deed would be entitled to have the deed set aside, as against the grantee and those claiming under him, it is difficult to see why a judgment creditor, having a judgment of record long prior to the date of the deed conveying property to the judgment debtor, would have greater rights in the property than the judgment debtor or his grantees. The interest which the judgment creditor has in the property is by reason of the statute and the judgment would have no greater effect than a prior conveyance made by said judgment debtor in consideration of an antecedent debt, in which case it has been held that the grantee cannot be held to be a bona fide purchaser.¹⁷

17—Sparrow v. Wilcox, 272 Ill. 632.

While it is true that fraud may be proven by circumstances, it is seldom expected to prove it by the admission of the party, and often direct and positive evidence of fraud cannot be found, and that proof of circumstances which convince the mind that a fraud has been committed is all that is required. But fraud will not be presumed, but must be proved by a fact by such clear and convincing evidence as leaves the mind well satisfied that the allegations of fraud are true. If, however, the motive and design of a party charged with fraud can be traced to an honest and legitimate source equally as well as to a corrupt one, the honest source must be preferred.¹⁸

A voluntary conveyance made prior to a contemplated marriage by either party without the knowledge of the other is *prima facie* evidence of fraud on the other's marital rights.¹⁹

Where a conveyance is made to a person occupying a position of trust and confidence to the grantor, and confers a beneficial interest upon the grantee it is presumed that it was procured through his undue influence, and the burden of proof is upon him to rebut the presumption and show that it was not procured by undue influence.²⁰

A conveyance having been procured from the grantor for an inadequate consideration by the false representations of the grantee as to the value of the land and as to its condition, the grantor is entitled to have the deed set aside notwithstanding no fiduciary relation is shown to have existed between them, as the grantor had the right to rely upon the statements made to him by the grantee as being true.

Where a sale of property is made which lies at a distance, so that the vendor has not the means at hand of ascertaining the truthfulness of the representations made to him by

18—Wolf v. Lawrence, 276 Ill. 11.

20—Pederson v. Nixon, 284 Ill. 421.

19—Jones v. Jones, 281 Ill. 595.

Citing: Dowle v. Driscoll, 203 Ill. 480.

Citing: Dunbar v. Dunbar, 254 Ill.

281.

the purchaser, he may rely upon the representations as being true and have redress if they are shown to be materially false.²¹

§ 1396. Effect of Conveyance—Statute—"Every estate, feoffment, gift, grant, deed, mortgage, lease, release, or confirmation of lands, tenements, rents, service or hereditaments made or had, or hereafter to be made or had, by any person or persons, being of full age, sound mind, dis-covert, and not procured by duress, to any person or persons, and all recoveries, judgments and executions had or made, or to be had or made, shall be good and effectual to him, her or them to whom it is or shall be so made, had or given, and to all others, to his, her or their use, against the judgment debtor, sellor, feoffor, donor, grantor, mortgagor, lessor, releasor, or confirmor, and against his, her or their heirs, claiming the same only as heir or heirs, and every of them, and against all others having or claiming any title or interest in the same, only to the use of the same judgment debtor, sellor, feoffor, donor, grantor, mortgagor, lessor, releasor or confirmor, or his, her or their said heirs, at the time of the judgment, execution, bargain, sale, mortgage, covenant, release, gift or grant made."²²

Under the Conveyance act a writing which states a grantor and a grantee, recites a valid consideration, with the usual words of grant, and is signed and sealed as required by law, is a valid deed and conveys title.²³

§ 1397. Deed Will Convey Whatever Interest Grantor Has in the Lands—It is undoubtedly true, as a general rule, that a deed in due form, executed by one, *sui juris*, for a specifically described tract of land, will pass the title to whatever interest or estate the grantor has in the property, and in such case, in the absence of anything to the contrary, it will be presumed that both the legal and equitable title to such interest or estate passed to the grantee.²⁴

21—Mosier v. Osborn, 284 Ill. 141.

22—Sec. 2 Ch. 30, R. S.

23—Kelly v. Parker, 181 Ill. 49.

24—Donlin v. Bradley, 119 Ill. 412.

Where a thing is granted, all the means that appertain to it are also granted, and all its fruits and effects pass with the thing as appurtenant or belonging to it, though not specially named. Whoever grants a thing is supposed also to grant that without which the grant itself would be of no effect.²⁵

§ 1398. **Merger of Titles**—The law is somewhat intricate as to the doctrine of the merger of titles. As a general proposition the law presumes that where the owner of the greater interest deeds real estate to the holder of the lesser interest, that the title merges in the grantee; and in case the grantee is the holder of a mortgage, and the grantor is the mortgagor, the legal presumption is that the mortgage debt is satisfied by the conveyance, and the mortgagee is paid in full by the execution of the deed by the mortgagor.²⁶

Where land is sold on an execution procured by the mortgagee, if purchased by him, the effect is the same as though the sale was made on a foreclosure proceeding. The mortgagee being the holder of the legal title, by the sale on the execution he becomes the owner of the mortgagor's equitable title, and thus unites in himself the entire title.²⁷

Where a bill is filed to foreclose a mortgage, and during the pendency of the suit the mortgagor conveys his interest to the mortgagee, this operates as a merger, and extinguishes the mortgage; it is therefore proper to dismiss the bill of foreclosure, as there is no mortgage to foreclose.²⁸

To innocent third parties, dealing with the premises without notice to the contrary, the correctness of this principle can hardly be questioned.²⁹

But to this presumption of the merger of titles there are many exceptions. Whether a merger of titles results from

25—2 Wash. on Real Prop. 622.

26—Weiner v. Heintz, 17 Ill. 259;

Mann v. Mann, 49 Ill. App. 472.

27—Cottingham v. Springer, 88 Ill. 90.

28—Robbins v. Moore, 129 Ill. 30.

29—Weiner v. Heintz, 17 Ill. 259.

a greater and less estate uniting in the same person depends upon what will best subserve the purposes of justice and the intention of the parties. It has always been held that the interest of the parties and their intention are controlling circumstances; and where it can be made known, or be inferred from the conduct of the parties, the court will look into all the circumstances of the case and ascertain the real intention. It has been said that if it appears that the holder of the incumbrance intended to discharge it, and rely exclusively upon his newly acquired title, the incumbrance is regarded as extinguished, and cannot afterwards be set up to strengthen and support the new title.

But it is further said that in transactions between the parties, and their heirs, the authorities are numerous to the effect that the mortgage will not be taken to have merged, but will be retained, or that equity will consider the two estates as co-existing in the mortgagee, when necessary for his benefit by reason of some intervening title or incumbrance. It will be presumed, as a matter of law, that the mortgagee must have intended to have kept the mortgage alive when it was essential to his security against an intervening title or incumbrance. And this presumption applies although the parties through ignorance of such intervening title or incumbrance, or through inadvertence, have actually discharged the mortgage of record and cancelled the notes.

If no intention has been manifested, equity will consider the incumbrance as subsisting or extinguished as may be most conducive to the interest of the parties; and a court of equity will keep alive both estates if it appears necessary to meet the ends of justice to do so. Where there is nothing in the deed from the mortgagor to the holder of the incumbrance from which the court can infer that it was the intention of the parties to cancel the indebtedness, the fact that the note and mortgage were surrendered to the mortgagor is not proof of the intention of the parties that the

indebtedness should be discharged, nor is the release of the mortgage of record evidence of such intention.

And after the ownership of the property and the mortgage have become united in the same party, and the mortgagee does anything which clearly shows that he recognized the incumbrance as still existing, this is strong evidence, if not conclusive evidence, of an intent that there should be no merger.³⁰

It is not the law that a complainant in a bill to foreclose a second mortgage cannot thereafter become the assignee of the first mortgage without having it merged in the one foreclosed.³¹

In order to constitute a merger of titles the conveyance must be made to the same party who is the owner of the mortgage, and in the same right, and in the same quantity of estate. So where the conveyance by the mortgagor was made to the mortgagee and another party jointly, or if a person who is an executor, and has the reversion in his own right, becomes possessed as executor of a term of years, or where the husband is the termor and the wife is the owner of the reversion in fee, or where the mortgagee acquires only a half interest in the mortgaged premises, a merger is not effected.³²

A merger will be prevented in equity only for the purpose of promoting substantial justice; it will not prevent a merger where such prevention would result in carrying out a fraud or other unconscientious wrong.³³

§ 1399. Mergers Not Favored in Law or Equity—Mergers are not favored either in law or equity. It is a well settled rule in equity that whether a merger takes place on the uniting of two titles in the same party depends upon the

30—*Farrand v. Long*, 184 Ill. 100; *Security T. & T. Co. v. Schlender*, 190 Ill. 609; *Moffett v. Farwell*, 222 Ill. 543; *Cole v. Beale*, 89 Ill. App. 426.

31—*Wahl v. Zoelck*, 178 Ill. 158.

32—*Cole v. Beale*, 89 Ill. App. 426; 1 Wash. on Real Prop. 355; *Mann v. Mann*, 49 Ill. App. 472; *Weiner v. Heintz*, 17 Ill. 259.

33—*Forthman v. Deters*, 206 Ill. 159.

intention of the parties, and a variety of other circumstances. Equity will prevent or permit a merger, as will best subserve the purposes of justice, and the actual and just intention of the parties. So, if after the ownership and the charge have become united, the party does any act which clearly shows that he regards the encumbrance as still subsisting, this is strong if not conclusive evidence of an intent that there should be no merger. And an assignment of a mortgage to a grantee of the mortgagor, unless he has expressly assumed to pay it and has thus made himself the principal debtor, does not generally create a merger. So the purchase of a judgment against the grantor by his grantee does not operate to extinguish the judgment by merger.³⁴

When a mortgagee acquires an equity of redemption from the mortgagor, equity will scrutinize the transaction with jealous care to see that the mortgagor has not been oppressively or otherwise improperly dealt with. But while this is true, it is nevertheless true that the mortgagee has the right to buy of the mortgagor the right of the equity of redemption.³⁵

§ 1400. Merger of Reversions—Rights Preserved—Statute—"That when a reversion expectant on a lease, made before or after the passage of this act, of any tenements or hereditaments, of any tenure, shall be surrendered or merged, the estate, which shall for the time being confer as against the tenant under the same lease the next vested rights to the same tenements or hereditaments shall, to the extent and for the purpose of preserving such incidents to, and obligations on the same reversion, as but for surrender and merger thereof, would have subsisted be deemed the reversion expectant on the same lease."³⁶ Sec. 2273, p. 1467, Vol. 2. J. & Ad. Stats.

§ 1401. Undisposed of Interest Remains with Grantor or Devisor—The modern rule is, that such property or interest

³⁴—Clark v. Glos, 180 Ill. 556.

³⁶—Laws of Ill. 1877, p. 65.

³⁵—Jones v. Foster, 175 Ill. 459.

as the grantor or deviser has not disposed of must remain in him, and cannot pass from him until there is some one in existence to receive it. And where there is a gift, depending upon a contingency, by way of use, under the Statute of Uses, there is no doubt that, until the contingency occurs, the use, and with it the inheritance, results and remains with the grantor. So, in the case of a will, the inheritance, until the contingency happens, and, if the contingency never happens, it so remains and becomes a vested estate in fee simple. The heir, in such case, takes the estate subject to the condition of being divested on the contingent remainderman coming into being.³⁷

Where the testator does not dispose of the fee simple of his estate, but simply creates a trust for the benefit of his wife and children, on the termination of the trust the fee will descend to his heirs at law as interstate property.³⁸

§ 1402. Possession Not Essential to Conveyance—Statute—“Any person claiming right or title to lands, tenements, or hereditaments, although he, she or they may be out of possession, and notwithstanding there may be an adverse possession thereof, may sell, convey and transfer his or her interest in and to the same, in as full and complete a manner as if he or she were in the actual possession of the lands and premises intended to be conveyed; and the grantee or grantees shall have the same right of action for the recovery thereof, and shall in all respects derive the same benefit and advantage therefrom, as if the grantor or grantors had been in the actual possession at the time of the execution of the conveyance.”³⁹

The fact that the land was in the actual adverse possession of another at the time of the execution of the deed will not affect the title of the grantee in the deed.⁴⁰

§ 1403. Joint Tenancy and Tenancy in Common—Statute—“No estate in joint tenancy in any lands, tenements (or) hereditaments, shall be held or claimed under any grant,

37—Peterson v. Jackson, 196 Ill.

39—Sec. 4, Ch. 30, R. S.

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40—Chicago v. Vulcan Iron Works,

38—Summers v. Higley, 191 Ill. 193.

93 Ill. 222.

devise or conveyance whatsoever heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors and trustees (unless otherwise expressly declared as aforesaid), shall be deemed to be in tenancy in common.”⁴¹

§ 1404. Conflict Between the Statutes on Joint Rights and Conveyances as to Joint Tenancies—There seems to be an apparent conflict between Section 1 of Chapter 76, R. S., entitled “Joint Rights and Obligations,” and Section 5 of Chapter 30, R. S., entitled “Conveyances.” The first of these sections reads: “That if partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to executors or administrators, and be considered to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common.”

Section 5 of Chapter 30 reads as follows: “No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or held under any grant, devise or conveyance whatsoever, heretofore or hereafter made, other than to executors or trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors or trustees (unless otherwise expressly declared as aforesaid), shall be deemed to be a tenancy in common.”

The conflict between these two sections of the statutes came under consideration by the Supreme Court in the case of *Mette v. Feltgen*, 148 Ill. 357. This was an action of ejectment and the parties claimed from a common source of title, being a deed from one Schintz “to Peter Mayer and Anna Mayer, his wife, not as tenants in common but

⁴¹—Sec. 5, Ch. 30, R. S.

as joint tenants," thereby conveying a certain piece of property, and dated April 23, 1878. The wife died, and her daughter, after attaining her majority, commenced a suit in ejectment to recover an undivided half of the premises, as the heir of her mother, against the grantees of her father, and she succeeded in the trial court. On appeal to the Supreme Court by the defendants that court says: "There can be no doubt that the parties in the Schintz deed intended thereby to create an estate in joint tenancy and not a tenancy in common, and it must be admitted that the language employed was apt and sufficient to accomplish that purpose. It only remains to be determined whether, under our statutes, the right of survivorship can still be regarded as an incident to an estate in joint tenancy. The doubt on this question grows out of the apparent conflict between Section 5, Chapter 30, of the Revised Statutes, entitled 'Conveyances,' and Section 1, Chapter 76, entitled 'Joint Rights and Obligations.' These statutes are *in pari materia*, and are to be construed together, and very much aid in such construction may be obtained, by examining their history, as a part of the legislation of the State."

On the 15th day of January, 1821, the General Assembly passed "An Act concerning partition and joint rights and obligations," and the court cites the aforesaid Section 1 of Chapter 76, which was the second section of that act.

Afterwards, on January 31, 1827, the General Assembly passed "An Act concerning conveyances of real property," the 5th section of which was the same as the 5th section of Chapter 30 aforesaid.

"In the Revised Statutes of 1845 the second section of the Act of 1821 appears as Section 1 of Chapter 56, entitled 'Joint Rights and Obligations,' while Section 5 of the Act of 1827 appears as Section 5 of Chapter 24, entitled 'Conveyances.' In the Revised Statutes of 1874, Section 2 of the Act of 1821 again appears as Section 1 of "An Act to Revise the Law in Relation to Joint Rights and Obliga-

tions,' approved February 25, 1874, and in force July 1, 1874, and Section 5 of the Act of 1827 appears as Section 5 of the 'Act Concerning Conveyances,' approved March 29, 1872, and in force July 1, 1872. Both sections have now been on the statute books concurrently since 1827, and both, since their original enactment, have been twice included, without change of phraseology, in general revisions of the statutes."

"It seems plain that the Act of 1821 undertook to deal only with joint tenancies and tenancies in common held by the tenants in their own right, or in the right of their wives. Such is the express limitation contained in the language of Section 1, and that limitation was undoubtedly intended to apply to and control the entire act. No other tenancies were within the legislative contemplation. The act, therefore, had no application to estates held by executors, trustees, or other holding in *autre droit*. But as to estates held by the tenants in their own right, or in the right of their wives, whether held as joint tenants or tenants in common, the act gave the right to compel partition, and in case of joint tenants, if partition was not made, the right of survivorship was taken away, and it was provided that the part of the tenant dying first should pass by descent or devise, and be subject to the debts, dower, charges, etc., and be transmissible to executors or administrators, and be considered to every intent and purpose in the same view as if the deceased joint tenant had been a tenant in common."

"The effect of this statute clearly was, to practically abolish joint tenancies, where the estate was held by the tenants in their own right, or in the right of their wives, or that which is the same thing, to convert them into tenancies in common. The right of survivorship, which is and always has been to the principal and distinguishing incident to joint tenancies was taken away, and upon the death of the tenant without having made partition, the estate

was to be treated and considered, to every intent and purpose, as a tenancy in common."

"The Act of 1827 made no reference to the Act of 1821, but as it was a later expression of the legislative will, it had the effect of repealing or modifying the former act, in so far as it was inconsistent therewith. It becomes important then, in the first place, to determine the proper interpretation to be placed upon the act standing by itself. It uses without explanation or qualification the terms 'joint tenancy' and 'tenancy in common,' terms having at common law a fixed and well understood meaning, it was doubtless intended to use them in their ordinary common law sense. Its effect was to restore the right to create estates in joint tenancy, as known to the common law, in so far as that right was abrogated by the Act of 1821, rather by tacit recognition than by express words, and then undertook to change the rule of presumptions obtaining at common law, where a conveyance of land was made to two or more persons. Where an estate was conveyed to a plurality of persons without adding any restrictive, exclusive or explanatory words, such conveyance, at common law, was held to constitute the grantees joint tenants and not tenants in common, it being necessary in order to create a tenancy in common by deed, to add exclusive or explanatory words, so as to expressly limit the estate to the grantees, to hold as tenants in common and not as joint tenants. By Section 5 of the Act of 1827, this rule, except in cases of conveyance to executors or trustees, was precisely reversed. Under that section, a conveyance to two or more persons, without exclusive or explanatory words, created a tenancy in common, and in order to create a joint tenancy, the estate had to be expressly declared to pass not in tenancy in common, but in joint tenancy. If the question had arisen after the time of the passage of the Act of 1827, and prior to the revision of 1845, it would have presented no material difficulty. The rule established by the Act of 1827, would

have been held to prevail, that being the latest act, and as that act clearly recognized the existence of estates in joint tenancy, as a well known species of common law estates, and expressly provided the mode by which they might be created, the result would have logically followed, that joint estates created in the manner prescribed were joint tenancies, in the common law sense, and possessed of qualities and incidents which the common law attached to them notwithstanding the provisions of the statute of 1821 to the contrary."

"The view that the estate in joint tenancy referred to it in the Act of 1827, was the common law estate, with its common law incidents, is strengthened by the provision in the act in relation to the tenancy when vested in executors or trustees. Tenancies of that kind were not within the purview of the Act of 1821, nor affected by its provisions. They were doubtless excluded from the operation of that act, on account of the manifest impropriety of compelling partition between joint tenant holding in a trust capacity, and the obvious advantage resulting from the application of the rule of survivorship to joint tenants of that character. The Act of 1827 also expressly excepts from its operation executors and trustees, thus keeping in force the common law rule, but provides that in other cases to create a joint tenancy, it must be expressly declared in the deed to be such and not a tenancy in common."

"But there is nothing in the Act of 1827, furnishing the least indication that the legislature intended to attach to joint tenancies, where the tenants held in their own right, any other or different incidents, than those which properly belonged to the estate where executors or trustees were the tenants. It is beyond question that in the latter class of joint tenancies, it was the intention of the act that the incident of survivorship should prevail, and as the act furnished no indication to the contrary, it would seem to be quite clear that the same rule was intended to apply to those where the tenants were such in their own right."

“Upon the revision of the Revised Statutes of 1845, the law on the subject, so far as it was declared by the statute was to be found in the Act of 1821 as modified by the Act of 1827, the latter act prevailing and furnishing the rule in all matters where the two were inconsistent with each other. It would seem, therefore, that the re-enactment of the two statutes, without change of phraseology, in the revision of 1845, and again in the revision of 1874, was intended to be a re-adoption of the statutory law on the subject in precisely the condition in which it was before the revision was made. It has been held, correctly, that where there are repugnant provisions in a revised code, those portions which are transcribed from the latter statutes must be deemed to repeal sections adopted earlier, or transcribed from earlier statutes, or to so modify them as to produce agreement between such repugnant provisions.”

“Section 2 of Chapter 131 of the Revised Statutes of 1874, is as follows: ‘The provisions of any statute so far as they are the same as those of any prior statute, shall be construed as a continuation of such prior provisions, and not as a new enactment.’ As applicable to our present Revised Statutes, this section furnishes a rule of construction. Under it, as it would seem, a statute gains no additional force by being included in a revision, but is only continued as a part of our statutory law having the same force and effect as before. Under this rule, the fact that one of the statutes now under consideration was re-enacted more recently than the other in the revision of 1874, is immaterial, as both statutes are old statutes continued in force, and no new one enacted.”

“Under these circumstances, we are disposed to hold that the two statutes under consideration still sustain to each other the same relation which existed prior to the revision of 1845, and they should be considered now the same as they would have been construed prior to that revision. As a consequence, the Act of 1827 must be regarded as repealing or modifying the Act of 1821, to the extent

of permitting parties to create the common law estate of joint tenancy, with its common law incidents, by expressly declaring in a deed running to two or more grantees, that the estate shall pass, not a tenancy in common, but a joint tenancy." ⁴²

The case of *Mitte v. Feltgen*, *ante*, was reviewed in the case of *Gaunt v. Stevens*, 241 Ill. 542, and it was there said: "While it is settled that the exact words of the statute need not be used in the instrument, yet the unfavorable disposition of the legislature towards joint estates has influenced this court in establishing the rule that the intention to create such an estate must be so clearly expressed as to leave no reasonable doubt in the mind of the court of the purpose to create such estate. If the instrument contains language from which it can reasonably be inferred that the maker contemplated a division of the property among the purchasers, or from which it can be seen that a distribution, either in equal or unequal shares, was intended, such language will be held to negative the intention to create an estate in joint tenancy, and the purchasers will take as tenants in common." ⁴³

In 1917, the legislature amended the act in regard to joint rights and obligations, by the addition of a proviso to Section 1 of the act principally relating to joint deposits in banks; it did not assume in any way to modify that portion of the act which related to joint tenancy in lands. It is assumed therefore that the principle announced in the *Mitte* case is not in any way modified. ⁴⁴

In 1875, John Mittel, by warranty deed, conveyed certain premises to Maria Jobst and Michael Jobst, her husband, "and the survivor of them in her or his own right." Maria Jobst died in 1885, intestate, leaving her surviving no issue but her husband, and the complainants in the bill,

⁴²—*Mette v. Feltgen*, 148 Ill. 357.

⁴⁴—*Laws 1917*, p. 557.

⁴³—*Gaunt v. Stevens*, 241 Ill. 542;

Barr v. Barr, 273 Ill. 621.

her next of kin. Afterwards, in 1888, Michael Jobst died, leaving no children, but leaving a will, in which he devised the property to his brothers and sisters, who claim the whole property conveyed to Maria Jobst and Michael Jobst, by the deed of 1875. The heirs of Maria Jobst instituted a suit to test this question, and claimed that upon the death of Maria Jobst an undivided quarter of the property descended to Michael Jobst, as surviving husband, and the other undivided quarter descended to the complainants, as the next of kin of Maria Jobst.

Under the rule established by the case of *Cooper v. Cooper*, 76 Ill. 57, had the land been conveyed by the deed of 1875, without the words "and the survivor of them, in his or her own right," it is clear that they would have held the fee as tenants in common, and upon the death of either of them the land would have descended to his or her respective heirs.

The question then to be determined is, what construction is to be placed upon the words found in the deed, "and to the survivor of them, in his or her own right"? These words cannot be rejected as surplusage. They were placed in the deed by the contracting parties for a purpose. In construing written contracts it is the duty of the court to ascertain the intention of the parties and that intention, when ascertained, must control; and, in arriving at the intention of the parties, effect must be given to each clause, word or term employed by the parties, rejecting none as meaningless or as surplusage."

The court then quotes Section 5, Chapter 30, on Conveyances on Joint Tenancies, and Section 1, Chapter 76, on Joint Rights and Obligation, and continues: "A joint tenancy is to be distinguished by unity of possession, unity of interest and unity of time in the commencement of the title. Tenants in common are such as have a unity of possession, but a distinct and several title to their shares. Between a joint tenancy and a tenancy in common the only

similarity which exists is, therefore, the unity of possession. A tenant in common is, as to his own individual share, precisely in the position of the owner of an entire and separate estate."

The question was, was there unity of interest created by the deed in question? The fee was not conveyed to two persons with right of survivorship. By the deed the first dying took only a life estate, while the survivor took the fee."

Under such circumstances the unity of interest did not exist. And if not, then an estate in joint tenancy was not created. Our statute in plain language declares that no estate in joint tenancy shall be held or claimed unless the premises shall expressly be declared to pass, not in tenancy in common but in joint tenancy. The deed in question contains no such declaration. It provides for a survivorship, it is true, which is regarded as one characteristic of a joint tenancy; but the declaration which the statute requires to establish a joint tenancy is nowhere found in the deed, and in the absence of such a declaration the courts are inclined to hold that the estate is not created. The language of the deed, when properly understood, will admit of but one construction, and that is, that the premises were conveyed to Maria and Michael Jobst for life, with a contingent remainder to the survivor in fee. It was doubtless intended that the one who should die first should take only a life estate in the premises, with remainder in fee to the survivor and his or her heirs.

The granting of an estate for life to two persons, and a contingent remainder in fee to the survivor, violates no rule of the common law or any statute of the state, and no reason is perceived why the deed should not be sustained, and the evident intent of the parties carried out.⁴⁵

§ 1405. Joint Tenancy Defined and Explained—A joint tenancy is where two or more persons have any subject of

⁴⁵—*Mittel v. Karl*, 133 Ill. 65.

property, jointly, in which there is (1) *unity of interest*, (2) *unity of title*, (3) *unity of time*, and (4) *unity of possession*. At common law a grant or devise to two or more persons without limitations created a joint tenancy. Words or circumstances of negation were necessary to avoid this result. The chief characteristic of joint estates was the doctrine of survivorship. The doctrine of survivorship is not in accordance with the genius of our institutions, hence this incident of the estate has been generally abolished in the United States, except in a few instances, and in those jurisdictions where joint estates are still recognized they are very much restricted by statutes.⁴⁶

§ 1406. Per My Et Per Tout Defined—In the quaint language of the law joint tenants hold, each “*per my et per tout*,”—“of a part and of the whole”—which, technically considered, is that for the purpose of tenure and survivorship, each is the holder of the whole, but for the purpose of alienation, each has only his own share. And the shares of several joint tenants are always presumed to be equal. If the grant of a parcel of land to two persons defines the share and interest each is to take, it creates an estate in common and not an estate in joint tenancy.

In joint tenancy each tenant has the whole and every part of the whole, with the benefit of survivorship. Such persons constitute in law but one person in regard to the estate, so far as the rest of the world is concerned, but as between themselves each is entitled to his share of the rents and profits so long as he lives.⁴⁷

§ 1407. Joint Tenancies Not Favored—It is true that estates in joint tenancy are not favored by our statutes as they were at common law, but the statute is not to be held with such strictness that joint tenancies may not be created but by the use of the express language in the deed as the language used in Section 5 of the statute.⁴⁸

⁴⁶—Gaunt v. Stevens, 241 Ill. 542.

⁴⁸—Cover v. James, 217 Ill. 309.

⁴⁷—I Wash. on Real Prop. 406.

§ 1408. **Intention to Create a Joint Tenancy Must Be Clearly Expressed**—While it is settled that the exact words of the statute, in regard to joint tenancy, need not be used in the instrument, yet the unfavorable disposition of the legislature toward joint estates has influenced the court in establishing the rule that the intention to create such an estate must be so clearly expressed as to leave no reasonable doubt in the mind of the court of the purpose to create such an estate. If the instrument contains language from which it can be reasonably inferred that the maker contemplated a division of the property among the purchasers, or from which it can be seen that a distribution, either in equal or unequal shares, was intended, such language will be held to negative an intention to create an estate in joint tenancy, and the purchasers will take as tenants in common.⁴⁹

§ 1409. **Severance of Joint Tenancies**—The authorities are abundant that a joint tenancy may be severed by one of the joint tenants conveying or mortgaging his interest in the property to a stranger.⁵⁰

Tenants in common are such as only have unity of possession, but a *distinct* and *several* title to their respective shares. Between a joint tenancy and a tenancy in common the only similarity that exists is, the unity of possession. A tenant in common is, as to his own individual share, precisely in the position of the owner of an entire and separate estate.⁵¹

A tenancy in common may be disposed of by conveyance, or by will, and will descend to the heir; it is subject to levy and sale on execution; in fact it may be disposed of the same as there were no joinder of interest.

The general rule is that an adult tenant in common may demand partition as a matter of right, and the fact that he is a remainderman and that the particular estate has not expired is not a valid objection; but equity will not

49—Gaunt v. Stevens, 241 Ill. 542.

51—Mittel v. Karl, 133 Ill. 65.

50—Lawler v. Byrne, 252 Ill. 194.

award partition at the suit of one in the violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one through whom he claims.⁵²

§ 1410. Contribution Between Tenants in Common and Joint Tenants—The equity of contribution arises where one of several parties who are liable for a common debt or obligation discharges the same for the benefit of all. The doctrine is frequently applied to tenants in common or joint holders of property.⁵³

The right to contribution does not arise out of contract or agreement between co-sureties to indemnify each other, but on the principle of equity, that where two persons are subject to a common burden it shall be borne equally between them.⁵⁴

§ 1411. Grant or Devise to a Class—The weight of authority seems to be that where an estate is devised to a class of persons described as survivors, such estate does not vest until the time designated for the beginning of the estate by that class of persons, and the word “survivor” or “survivors” in such case has reference to that period, unless the will shows a different intent. So where the words of a will are: “I hereby give the fee simple,” of certain lands “to my grandchildren, whatever number they may be, share and share alike, to take effect only after the death of my said daughters,” to whom a life estate had been granted, a vested estate in remainder is immediately created in the grandchildren *in esse* at the time of the testator’s death, to be opened, however, upon the subsequent birth of other grandchildren by either of the testator’s daughters, to let them into an equal share with those in being at the time of the testator’s death. Each grandchild in such case, takes an equal, undivided vested remainder in the lands devised, subject to be divested, *pro rata*, from time to

52—Dee v. Dee, 212 Ill. 338.

54—Sledge v. Dobbs, 254 Ill. 130.

53—Frost v. Galesburg, E. & E.
R. R. Co., 167 Ill. 161.

time, by the birth of other grandchildren of the testator; and upon the death of any such grandchild after the death of the testator, his or her estate passes to his or her heirs. And they take as tenants in common under the statute.⁵⁵

Where a devise is to a class, the death of one of them before the testator will not cause a lapse of any part of the gift, but those of the described class who survive the testator take the whole of it.⁵⁶

Under a devise of lands to the testator's grandchildren born to the bodies of his two daughters, whatever number they may be, share and share alike, to take possession only after the death of his two daughters, and providing that the daughters shall have full use and enjoyment of the lands during their natural lives, it was held, that the right to the possession in grandchildren was to commence at the same moment that the right of the two daughters should cease, which was at the death of both daughters, and that the daughters both took the full use of the lands from the death of the testator until the death of the surviving daughter, without the right of survivorship, and that upon the death of one of the daughters her interest did not pass to the other, but passed to her heirs, or in the case of a will, to her devisees, until the death of the other daughters, in the absence in the will of express words creating a joint tenancy.

Under the statutes of this State relating to joint tenancies, and providing against survivorship, on the death of one joint tenant before partition, such a devise creates a life estate in the two daughters until the death of both, as tenants in common, from the time of the testator's death and on the death of one of the daughters of the estate devised to her does not terminate, but survives in favor of her grantees, heirs or devisees whether any partition is made

55—*Cheney v. Teese*, 108 Ill. 473.

56—*Lancaster v. Lancaster*, 187 Ill.

or not. In such case the clause postponing the remainder to the death of both the daughters does not change the result, as the heir or devisee of the daughter dying first, does not take under the grandfather's will, but under the Statute of Descent, or the will of such daughter as to her undetermined estate. The fact of there being grandchildren of the testator does not prevent them from acquiring such estate from their mother by purchase or devise.⁵⁷

Where a lapse takes place in a gift of the residue, either because the sole residuary beneficiary has pre-deceased the testator, or because one of the several residuary beneficiaries who take as tenants in common have died before the testator, the gift which lapse is not reabsorbed into the residue, but goes as intestate property either to the heirs or the next of kin of the testator according to the nature of the property.

This rule, however, does not apply to a residue which is given in language which creates a joint tenancy among the residuary legatees, and, *a fortiori*, where the residuary gift is to several who take as members of a class, to be ascertained at the death of the testator.⁵⁸

§ 1412. Interest or Shares of Tenants in Common—When a conveyance is made to two or more parties, without designating the proportion each is to take, the law presumes they are to take in equal shares, and they will be considered as tenants in common with equal interests. If the parties claim in unequal interest, the burden is on the party making the claim, and the proof in such case must be clear and satisfactory.⁵⁹

A lease executed by one co-tenant in behalf of himself and his co-tenants will be presumed to have been executed by authority, unless the contrary appears.⁶⁰

§ 1413. Accounting Between Tenants in Common—When one tenant in common has the exclusive possession of the

57—Cheney v. Teese, 108 Ill. 473.

59—Keuper v. Mette, 239 Ill. 586.

58—Magnusen v. Magnusen, 197 Ill. 496.

60—Durlinger v. Fisher, 193 Ill. App. 376.

premises, he will be accountable to his co-tenant for the rents and profits of the property. But in such an accounting the tenant occupying the premises is entitled to credit for the taxes paid by him and compensation for improvements made by him.⁶¹

§ 1414. **Estate by the Entirety**—Under the common law, when, a conveyance is made to a man and his wife, they become neither joint tenants in common, but tenants by the entirety. For husband and wife being considered as one person in law, they could not take the estate by moieties, but both are seized of the entirety *per tout et non per my*, the consequence was that neither husband nor wife could dispose of any part without the assent of the other, but the whole must remain to the survivor. So it was held that a deed executed by a husband and wife, who held as tenants by the entirety which was void, because it was not acknowledged by the wife, and the wife did not convey the interest of the husband.⁶²

One of the incidents, at common law, of an estate created by a conveyance to husband and wife (an estate by the entirety), was that there could be no severance of their interest. This rule is predicated upon the principle that in law husband and wife are but one person, and hence cannot take an estate by moieties, but both are *seized of the entirety* so that neither can dispose of the estate without the consent of the other, but the whole remains to the survivor. But the reason for this common law rule ceased with the adoption of the Married Woman's Act of 1861. After the adoption of that act a conveyance to husband and wife created in them a tenancy in common, unless the instrument vesting the estate in them expressly declared that the estate should not be a tenancy in common but a joint tenancy. Tenancy by the entirety, therefore, ceased to exist after the disabilities of married women were removed.⁶³

61—Blackaby v. Blackaby, 185 Ill. (10 Ill.) 113; Lwx v. Hoff, 47 Ill. 94. 425.

62—Mariner v. Saunders, 5 Gilm.

63—Lawler v. Byrne, 252 Ill. 194.

The estate by the entirety was based on the theory of the common law that husband and wife were considered but one person, and could not have separate and conflicting property interest and rights. But our statutes, by the Married Woman's Act of 1861, have so far changed the common law that they are not now considered one person, so far as the acquisition and enjoyment of property is concerned. To the extent of acquiring property, and so far as its enjoyment is concerned, and the enjoyment of her earnings, the statute has declared, in effect, that they are two independent persons; and in doing so, great modifications have been wrought as to their rights of property. And, under these great changes, no reason is perceived, nor is any suggested, why a married woman should not hold property thus acquired, in fee, as a tenant in common with her husband, precisely as she might with any other person. The husband, under the statute, has no more immediate interest in or control over her property than has any other person. So it was held that where a deed conveyed property to a man and his wife "and the heirs of her natural body," that the husband and wife took title as tenants in common, each an undivided half, and on the death of the husband, his surviving wife took dower in his half of the estate so conveyed to them.⁶⁴

§ 1415. After Acquired Title by Grantor Inures to Benefit of His Grantee—Statute—"If any person shall sell and convey to another, by deed or conveyance, purporting to convey an estate in fee simple absolute, in any tract of land or real estate, lying or being in this state, not then being possessed of the legal estate or interest therein at the time of the sale and conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate to the land or real estate so sold and conveyed, it shall be taken and held to be in trust and for the use of the grantee or vendee; and the convey-

⁶⁴—Cooper v. Cooper, 76 Ill. 57.

ance aforesaid shall be held and taken, and shall be as valid as if the grantor or vendor had the legal estate or interest, at the time of said sale or conveyance.”⁶⁵

§ 1416. Effect of the Statute—The effect of this section 7 is simply to give a deed, otherwise void as a conveyance, because the grantor had no title, the validity which makes it operative when the grantor subsequently acquires title. The statute declares that the effect of such a deed shall be to pass any after-acquired title by the grantor, the same as if he were seized of it when the deed was made.⁶⁶

Where a party makes a conveyance, purporting to convey an estate in fee simple to another, and by a decree of court his title is confirmed or perfected, such title will pass to his grantee, under the 7th section of the Statute on Conveyances.⁶⁷

An estate “in fee simple absolute,” as that expression is used in the statute, means a perfect title, and the seventh section of the chapter on “Conveyances” has application to titles of that character.⁶⁸

The words “grant, bargain and sell,” included in a mortgage inure to the benefit of the mortgagee, and pass any after acquired title by the mortgagor for the benefit of the mortgagee.⁶⁹

And the after acquired title will inure whether there is seizin or not.⁷⁰

§ 1417. Application of the Statute in Regard to After Acquired Title by the Grantor—Where a party makes a deed purporting to convey the fee, with full covenants of warranty, an adverse title afterwards acquired by him will, by the express terms of the statute, and by force of the doctrine of estoppel, inure to the benefit of his grantee.⁷¹

Where the purchaser at an execution sale and the holder

⁶⁵—Sec. 7, Ch. 30, R. S.

⁶⁶—Guertin v. Mombleau, 144 Ill. 32; Trustees of Schools v. Wright, 11 Ill. 603.

⁶⁷—Wadhams v. Gay, 73 Ill. 415.

⁶⁸—Frink v. Darst, 14 Ill. 304.

⁶⁹—DeWolf v. Hayden, 24 Ill. 525-6; Pratt v. Pratt, 96 Ill. 184.

⁷⁰—King v. Gilson, 32 Ill. 348.

⁷¹—Lewis v. Pleasants, 143 Ill. 271.

of the certificate of purchase, before the time for redemption expires, conveys his interest in the lands by deed to a third party, without assigning the certificate of sale, a deed executed by the sheriff to the purchaser at the execution sale will inure to the benefit of his grantee.⁷²

If a party holds the equitable title to land, and is entitled to the legal title, and while so holding the equitable title conveys the same by a quitclaim deed, on his subsequently acquiring the title, it will inure to the benefit of his grantee.⁷³

An outstanding title acquired by a mortgagor, after he has executed the mortgage, containing covenants or warranty, inures to the benefit of the mortgagee.⁷⁴

§ 1418. Principle Applies to Warranty Deeds by Administrator—Even though the grantor sells the property as administrator and conveyed title with full covenants of warranty, to the purchaser, it is his duty to acquire the outstanding title to answer his own covenants, and if he does so purchase it, such purchase will be presumed to have been made for such purpose, and the title he thus acquires will inure to the benefit of his grantee. He can never, against his own deed, aver that the estate he conveyed was not a fee simple estate.⁷⁵

The rule of law in regard to after acquired title applies to a conveyance of an executory devise. No distinction is made between future contingent interests, whether in the form of a remainder or of an executory devise so far as the inuring of after acquired title is concerned.⁷⁶

1419. Application of Principle to Deeds of Married Women—While there may have been some doubt as to the application of this section of the statute to deeds of married women, it is conceded practically, that since the Mar-

72—Chicago, B. & Q. R. R. Co. v. Chamberlain, 84 Ill. 333.

73—Welch v. Dutton, 79 Ill. 465.

74—Bybee v. Hageman, 66 Ill. 519;
Laggar v. Mutual Union L. & B.
Assn., 146 Ill. 283.

75—Jones v. King, 25 Ill. 383
(334).

76—Smith v. Carroll, 286 Ill. 137.

ried Woman's Act of 1874, the provisions of the statute would apply to deeds of married women, as it does to deeds of males or femmes sole.

But by section 18 of the Conveyance Act it is provided that "Any married woman, being above the age of eighteen years, joining with her husband in the execution of any deed, or other writing for or relating to the sale, conveyance or disposition of her lands or real estate, or any interest therein, shall be bound and concluded by the same in respect to her right, title, claim or interest in such real estate as if she were sole. It may well be that prior to the Act of 1874, she would not be liable to an action of covenant on the covenants in her deed, but it by no means follows, that under the section above mentioned that the title subsequently acquired by her would not inure to the benefit of her grantees."⁷⁷

A warranty deed by a married woman, of land claimed by her, will pass to her grantee a subsequently acquired title; but when she unites in a warranty deed with her husband, of his land, merely for the purpose of releasing her inchoate right of dower, she will not be estopped from acquiring an outstanding title, and asserting the same in her favor.⁷⁸

§ 1420. Non-Application of the Statute in Regard to After Acquired Title by the Grantor—Where a party claiming the benefit of this section has no deed conveying a fee simple title absolute, but only a chattel mortgage relating to the rents and issues of the property, he cannot claim the benefit of an after acquired title by his mortgagor; and if there be no covenant appropriate to that end, he cannot claim the benefit of the doctrine of estoppel.⁷⁹

Where a married woman joins with her husband in the execution of a warranty deed simply for the purpose of releasing her inchoate right of dower, the acquisition of an

77—Guertin v. Mombleau, 144 Ill. 32.

78—Sanford v. Kane, 133 Ill. 199.

79—Bowen v. McCarthy, 127 Ill. 17.

adverse title by her thereafter will not inure to the grantee in such deed. But the rule would be different if she were to so convey her separate property.⁸⁰

Where a party gives a deed or mortgage on land, the title to which fails and the grantor or mortgagor afterwards acquires title by deed, but gives a mortgage back as a part of the same transaction for a part of the purchase money, he will not in equity become seized of the title so subsequently acquired in such a manner, that it will inure to his former grantee or mortgagee, as against the second mortgage.⁸¹

§ 1421. Principle Not Applicable to Heirs Acquiring Title Independently of Ancestor—Where it appears that the heirs of a grantor acquired their outstanding title after the death of their parent, and from a different source, independently of their ancestor, then the 7th section of the Conveyance Act does not apply, and such heirs are not estopped from asserting their title.⁸²

§ 1422. Principle in Regard to Subsequently Acquired Title Not Applicable to Quit Claim Deeds—A release or simple quitclaim deed, made by one having no title or interest at the time, and containing no covenant either expressed or implied and professing to convey only such interest as the releasor had, cannot be held to be effectual to vest a subsequent acquired title by the releasor in the releasee, either upon the principle of estoppel, that the subsequent title is to be held as acquired for the use of the releasee, or upon any other principle. On the contrary, the books are full of cases in which it is held that a release or quit claim only passes the right which the releasor had had at the time the release was made.⁸³

Where there has been neither fraud nor warranty, the purchaser of the land cannot resist the payment of the

80—Sanford v. Kane, 133 Ill. 199.

81—Elder v. Derby, 98 Ill. 228.

82—Whitson v. Grosvenor, 170 Ill.

271; Ebey v. Adams, 135 Ill. 80.

83—Frink v. Darst, 14 Ill. 304;

Holbrook v. Debo, 99 Ill. 372; Glover

v. Condell, 163 Ill. 566.

notes he may have given as part of the purchase price thereof, on the ground that he did not acquire title. And in such case an acquirement by his grantor of an outstanding title does not inure to his benefit.⁸⁴

§ 1423. Exception to Rule as to Quit Claim Deeds—While it is the general rule that section 7 of the chapter on conveyances does not apply to quitclaim deeds, there seems to be an exception to the rule. Thus, where at a public sale of lands the successful bidder has paid in full his bid and thereby becomes the equitable owner of the land, and before a deed is issued, quitclaims his interest to another, on a deed being issued to the bidder, it is held to inure to the interest of his grantee. The legal title conveyed to him by the deed to him related back to the time of making his quitclaim deed, so as to pass to his grantee the legal title to the land. It is the doctrine of relation applied to protect purchasers, that where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be performed, and to this the other acts shall have relation. There is no better rule founded in law, reason and convenience than this, that all the several parts and ceremonies to complete the conveyance shall be taken together as one act, and operate from the substantial part by relation.⁸⁵

§ 1424. Words of Inheritance Not Necessary—Statute—“Every estate in lands which shall be granted, conveyed or demised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate is not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law.”⁸⁶

84—Hitchcock v. Fortier, 65 Ill. 239.

85—Welch v. Dutton, 79 Ill. 465; Chicago, B. & Q. R. R. Co. v. Cham-

berlain, 84 Ill. 333; Edwardsville R. Co. v. Sawyer, 92 Ill. 377.

86—Sec. 13, Ch. 30, R. S.

Prior to the act of July 21, 1837, a conveyance of land simply to the grantee by name, without the word heirs conveyed only a life estate. This was the common law.⁸⁷

§ 1425. Former Necessity of the Use of the Word Heirs in Conveyance—The necessity of the use of the word "heirs" in conveyances as a word of inheritance has been abolished by the Statutes of Illinois, but its force and effect under the common law should be understood. It was a word of limitation and inheritance, and no estate in fee simple could pass without its use. It was technical in character, and no synonym could take its place. Even a grant to one and his "heir" has been held to give only a life estate; so the words "or his heirs," "and his heirs during the life of another," or "forever," or "assigns," have been held to have no effect in limiting or defining what estate was granted thereby. And the word "seed" or "offspring" or "and the issue of his body," or "his executors, administrators and assigns," could not be substituted for the word "heirs."⁸⁸

Under the feudal law it was competent for the lord, in parting with his feud, to prescribe the duration of its ownership, and to whom it should pass afterwards. For this reason, great strictness was observed in construing and applying the language used in making the donation of the feud. So, if the gift was to one without words of limitation, it was only for such a term of time as he could possibly hold it, that is, for his life. But if given to one and his "heirs" it was understood to pass in succession, after the death of the donee, without being subject to his control by any act done by him, to his descendants, who were recognized by the feudal law as heirs. At first all the males took equally, but afterwards, in analogy to military feuds, the oldest son took the whole, to the exclusion of the rest. In this way, it is not difficult to understand the origin and

⁸⁷—*Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377.

⁸⁸—*Wash. on Real Prop.* 56.

reason of the rule which requires, at common law, the use of the word "heirs" in a deed of grant, in order to pass a fee or estate of inheritance in the land granted, for which no synonym can be substituted.

The rule was that the subsequent limitation to the heirs must be to the heirs of the ancestor who takes the particular estate. Thus, where the estate is limited to the wife for life, remainder to the heirs of the bodies of the husband and wife, the freehold being in the wife alone, the limitation over would be a remainder, and the heirs would take as purchasers. But had the first limitation been to the husband and wife, with remainder to the heirs of their bodies, the fee under the rule would be in the husband and wife, and the heirs would take by descent.⁸⁹

Such was the common law. But it has been altered by the Statutes of Illinois, giving to deeds in effect the same construction that has long been given to wills, and passing an estate of inheritance where the word heirs is not used where such appears to be the intention of the grantor.⁹⁰

Under our statute every devise of land is deemed a fee simple estate of inheritance, if a less estate is not limited by express words, or it does not appear otherwise by construction or operation of law. The words "and to her children, heirs and assigns after her," do not show that a less estate than one in fee was devised by operation of law. The words "children, heirs," may be used as expressing the same thing, and as taking through the devisee by inheritance, and not under the will.⁹¹

§ 1426. The Word "Heirs" a Technical Word—The word "heirs" is a technical word, having a definite legal significance, and, unexplained and uncontrolled by the context, must be interpreted according to its technical import, as designating the persons appointed by law to succeed to the

89—I Wash. on Real Prop. 270; 2 Black. Com. 107.

91—Latter v. Shepard, 85 Ill. 242.

90—Seymour v. Bowles, 172 Ill. 521; I Wash. on Real Prop. 28.

real estate of the ancestor in cases of intestacy. "Heirs of the body" are a limited class of heirs, restricted to lineal descendants.⁹²

The expression of "right heirs" means nothing more than heirs simply, and a limitation directly to the "right heirs" of one carries a fee without adding the words "and their heirs."⁹³

There is always a strong legal presumption that the word "heirs" is used in its technical sense, as denoting the whole of the indefinite line of inheritable succession.⁹⁴

§ 1427. **Heirs at Law**, in this State are such, who by the Statute of Descent, inherit the estate of intestates.⁹⁵

Under the word heirs are comprehended the heirs of heirs, *ad infinitum*.⁹⁶

The word "heir" is a collective noun, and includes the plural as well as the singular, although it is frequently used in a plural form, as "heirs."⁹⁷

Ordinarily, the words "heirs" or "heirs at law," are used to designate those persons who answer this description at the death of the ancestor. The word "heir" in its strict and technical import, applies to the person appointed by law to succeed to the estate in case of intestacy. Hence, where the word occurs in a will, it will be applied to the person who is the heir of the testator at his death, unless the intention of the testator refer to those, who shall be his heirs at a period subsequent to his death, is plainly manifested in his will. This construction or definition is not changed by the fact, that a life estate may precede the bequest to the heirs at law, nor by the circumstance that the bequest to the heirs is contingent on an event that may or may not happen.⁹⁸

92—Aetna L. I. Co. v. Hoppin, 249 Ill. 406.

93—I Wash. on Real Prop. 57.

94—Carpenter v. Hubbard, 263 Ill. 571.

95—Richards v. Miller, 62 Ill. 417;

Gauch v. St. Louis M. Ins. Co., 88 Ill. 251.

96—Crocker v. Smith, 10 Ill. App. 376; Merrill v. Atkin, 59 Ill. 19.

97—Lambe v. Drayton, 182 Ill. 110.

98—Kellett v. Shepard, 139 Ill. 433.

A simple devise of land, without any words of perpetuity or inheritance, under the statute, is sufficient to pass an absolute estate in fee, unless a contrary intent is shown in other parts of the will.⁹⁹

Where there is a devise in terms to a trustee, either with words of inheritance, or, under section 13 of the Conveyance Act, without such words the devise is *prima facie* in fee, unless limited or restrained by other provisions of the will.¹

A will provided: "At the death of my said wife and daughter Louie I give and devise to my son, Thomas F. Bowlin, and to my daughter Vessa Bowlin, all of the said quarter section of land, * * * to my son Thomas F. Bowlin and my said daughter Vessa, and to the heirs of their bodies, respectively." It was contended by the complainants in a bill for partition that the words in the will that "at the death of my wife and daughter Louie I give and devise to my son Thomas F. Bowlin, and my daughter Vessa Bowlin, all of said quarter section of land" constituted a complete devise and created a fee simple estate under the rule in *Shelley's case*, and that the remainder of the paragraph is wholly inoperative as imposing any limitation upon the fee simple estate devised by those words. The court said that this position was not tenable. Even if it be assumed that the remainder of the sentence or clause cannot be held to limit or qualify the estate created by the words quoted, and therefore, if they should be ignored, it would not come within the rule in *Shelley's case*, for the reason that in that part of the clause quoted there are no words of inheritance. No words are used declaring what estate is devised. Under the common law, a devise, if made in the language above quoted, would give a life

99—*Giles v. Anslow*, 128 Ill. 187; *Thomas v. Miller*, 161 Ill. 60; *Walker v. Pritchard*, 121 Ill. 221; *Turner v. Hause*, 199 Ill. 464.

1—*Harvey v. Ballard*, 252 Ill. 57.

estate only to the devisees. The rule at common law has been abrogated by our statute, and the words quoted, disregarding the latter part of the clause in the will, would create a fee simple estate of inheritance. But, the entire clause being considered, the will limits the estate to one less than a fee by express words.²

§ 1428. Construction of Section 13 of Conveyance Act—It is required by section 13 of the Conveyance Act that every word used in a conveyance shall be given weight in construing the instrument, no matter where the same may be found, where the maker has not used words of grant or devise, which at common law would convey an estate of inheritance.³

§ 1429. Statute Not Applicable Where Words of Inheritance Are Used—Where the words necessary at the common law to pass an estate of inheritance are used in a conveyance or will, Sec. 13 of the Conveyance Act has no application. It is only when such words are wanting that the courts are authorized to inquire whether an estate less than a fee is limited by express words or not.⁴

§ 1430. Rights of Adopted Children—The adoption of children was a thing unknown to the common law, but was a familiar practice under the Roman or civil law, and our modern statutes are taken from the latter, and so far modify the rules of the common law as to the succession of property. So in a deed which conveyed property to the grantee and "her heirs generally" it was held that an adopted child inherited from his adopting parents under such designation.⁵

§ 1431. Heirs Take by Descent Rather Than by Will—The principle that heirs take by descent, when there is a gift to them by will equal to that which they would take by descent, follows the rules of law, that a descent operates

2—Bowlin v. White, 244 Ill. 623.

5—Butterfield v. Sawyer, 187 Ill.

3—Bauman v. Stoller, 235 Ill. 480. 598.

4—Wolfer v. Hemmer, 144 Ill. 554;

Lambe v. Drayton, 182 Ill. 110.

before a devise, the title by descent is the better title. The real ground for the establishment of the rule was, that in the times of feudality, it was for the advantage of the lord that the heir should take by descent, that the lord might be entitled to the fruits of seigniority.⁶

§ 1432. **Rule in Shelley's Case**—It may be proper here to consider that perplexing rule of construction in regard to deeds and devises, known as the *rule in Shelley's case*.

One of the best modern expositions of this important rule is found in the case of *Baker v. Scott*, 62 Ill. 86. It has become a leading case on this subject, and is frequently referred to by the courts and text writers. The opinion was written by Mr. Justice Breeze, whom all old lawyers of the State will recognize as a learned and able jurist. In order that the reader may have the benefit of the decision extensive extracts are taken from the opinion in the case.

Mary Sophia (a daughter of Orestes H. Wright, the testator), the devisee named in one of the clauses in the will, intermarried with John Scott, and they executed to Frederick Baker a deed in consideration of the sum of \$875, for one of the tracts of land of which her father died seized, and which had been set off and allotted to her in certain partition proceedings, she claiming the fee therein. To secure the payment of \$675, part of the purchase money, Baker executed his two notes, and a mortgage on the land. The notes not being paid she filed her bill to foreclose the mortgage. Baker answered, admitting the making of the notes and mortgage, and alleging that he purchased the land; the consideration money expressed in the deed being its full value, and paid in cash \$200, and received a conveyance in fee, with the usual covenants of warranty, and then alleges that the complainant derived her title through a devise from her father, she took by that devise, a life estate only in the land; and her conveyance to him carried only that estate to him, and that he should be compelled to

6—I Preston on Estates, 391.

pay on the notes and mortgage the present value of that estate at the time of the conveyance, deducting therefrom the purchase money paid, and alleging that such present value, after deducting the money paid, left nothing due on the notes and mortgage. He also filed a cross bill alleging substantially the same facts, and praying for the cancellation of the notes and the mortgage. The complainant answered the cross bill, and insisted that by the terms of the devise the fee was vested in her.

The trial court decided that the complainant had a fee simple in the land, under and by virtue of the devise, and decreed a sale of the premises to satisfy the notes and mortgage. The defendants appealed, and contended that by the devise, a life estate only was vested in the complainant, and the complainant contending that the words used in the will fall within the rule in Shelley's case. The court says:

"The first point to be settled is, what is the rule in Shelley's case? That case arose in the twenty-third year of the reign of Elizabeth, about the year 1579, near three hundred years ago, and is reported in I Coke's Rep., p. 93b, wherein among other rulings, it was held, when an ancestor takes an estate of freehold, and in the same gift or conveyance, an estate is limited either mediately or immediately to the heirs, either in fee or in tail, the heirs are words of limitation of the estate, and not words of purchase."

"Preston, in his elaborate treatise on Estates, devotes a chapter of near two hundred pages, to a critical and searching analysis of this rule, and says the rule may thus be expressed: First. Where a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and afterwards, in the same deed, will, or other writing, there is a limitation by way of remainder, with, or without the interposition of any other estate, if an interest of the same quality, as legal or equitable, to his heirs generally, or his heirs of his body, by that name in deeds

or writings of conveyance, and by that, or some such name in wills, and as a class or denomination of persons to take in succession from generation to generation, the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imposed by that limitation."

"He expresses the rule secondly, thus: Whenever the ancestor takes an estate of freehold, or frank tenement, and an immediate remainder is therein limited in the same conveyance to his heirs or his heirs in tail, the remainder is immediately executed in possession, in the ancestor so taking the freehold, and, therefore, it is not contingent or in abeyance.

"A third, and still more accurate expression of the rule is, as we have stated it at the outset, taken from the rulings of the court, as found in the reported case."

"The author further says, this rule has been expressed with great precision by one of the very able counsel, Sergeant Glynn, in *Perrin v. Blake*, to be: In any instrument if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body he takes a fee tail; if it be to his heirs, a fee simple.

"This rule is venerable for its antiquity, having received the sanction of the highest courts in England as far back as the 18 of Edward II, and is based on their authority, as found in the year books of that and subsequent reigns.

"This we gather from the able argument of Mr. Justice Blackstone in the opinion delivered by him in the Court of Exchequer, in the celebrated case of *Perrin v. Blake*, first reported in a 4 Burr, 2579, but more fully in 3 Greenleaf *Cruse on Real Property*, 313."

That was a case arising under the will of William Williams, and the question arose upon a demurrer to a replication in action of trespass. It was there held by three judges against one (in the trial court), that the legal opera-

tion of the word heirs, as a limitation, might be controlled by the manifest intent of the testator, and be construed as a description of a purchaser. In the will in question was this clause: "It is my intent that none of my children shall sell his estate for longer than his life," and to that intent, he gives all his estate to his said son, John, and said infant for their lives, remainder to trustee to preserve contingent remainders, remainder to the heirs of the body of his said sons.

"Three of the judges (of the trial court) held that 'heirs' must be construed a word description, and the heir would take the inheritance as a purchaser, and therefore, John took only an estate for life.

"On a writ out of the Exchequer Chamber the case was there elaborately argued, and six of the seven judges concurred in overruling the judgment of the King's Bench (the trial court), giving full effect to the rule in Shelley's case. * * *

"The leading question in the case, for no one disputed or doubted the rule in Shelley's case, was: *Whether a testator's manifest intent might control the legal operation if the word heirs as a limitation.*

"Even Justice Blackstone, in delivering his opinion, said he agreed with the King's Bench that if the intention of the testator manifestly and certainly appeared by plain expression, or necessary implication from other parts of the will, that the heirs of the body of A should take by purchase, and not by descent, then a devise to A for life, and after his decease to the heirs of his body, not only might, but must, be construed an estate in strict settlement, but he thought it did not manifestly and certainly appear from the mere intended restraint from the power of alienation in A, that the testator had meant that the heirs of A's body should take by purchase and not by descent, or even that he knew the difference between the two methods of taking.

"But it was held by the seven judges of the Exchequer,

Justice Blackstone concurring, against one, as has been uniformly so held since, that the rule in Shelley's case was not a rule of interpretation but an inflexible rule of property; and that in all cases of devises of legal estates whether lands given to a person for life, or for any greater estate, with an immediate remainder to the heirs, or the heirs of the body of such devisee, the word 'heirs' or the words 'heirs of the body' shall operate as words of limitation, and give the devisee an estate in fee simple or in tail.

"As we understand, one of the principal reasons for the establishment of this rule was to prevent the abeyance or suspension of the inheritance. The rule, therefore, is only applied to those limitations in which the word 'heirs' is used, on account of the maxim that '*Nemo Haeres viventis.*' But the rule does not apply when the words 'lawful issue,' 'issue,' 'sons,' or 'children' are used instead of 'heirs.' These words are regarded as words of purchase, and not of limitation, and the ancestor, therefore, would take only a life estate, and his sons or children would take by purchase, for the reason that they are a designation of persons to take originally in their own right. But when the limitation is to the 'heirs,' it is, in legal intendment as a class or denomination of persons to take in succession from generation to generation.

"As *Lord Thurlow* said, in *Brown v. Morgan*, 1 *Brown's Ch. R.* 216, when the heir takes in the character of heir, he takes in the quality of heir, and all heirs taking as heirs must take by descent. Since the solemn determination in *Perrin v. Blake*, in the Exchequer, the rule in question has been regarded as one of the most firmly established rules of property and strictly speaking, no instance can be adduced of a departure from it.

"The requisites of the rule are, that there must, in the first instance, be an estate of freehold devised, there must be a limitation to the heir or heirs of the body of the person taking the estate, by that name, and not the heirs as

meaning or explained to be 'sons,' 'children,' etc., that the heirs must be named to take as a class or denomination of persons in succession from generation to generation, and by way of remainder, or at least so that the estate to arise from the limitation to the heirs, and the estate of freehold in the ancestor shall both owe their effect to the same deed, will or writing, and that the several limitations shall give interest of the same quality, both legal or both equitable."⁷

In any instrument, if a freehold is limited to the ancestor for life, and the inheritance to his heirs either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee tail; if to his heirs generally, a fee simple.⁸

The rule operates upon the words of inheritance without affecting the words of procreation, so that if, in any case, the words, "heirs of his body," or other equivalents sufficient to create an estate tail, are used, a fee tail is vested in the first taker, and not the fee simple.⁹

Although the instrument creating the life estate leaves the remainder to the "lawful heirs" of the life tenant, yet the rule in Shelley's case applies. The qualifying adjective "lawful" does not in any way change the meaning of the word "heirs" to one of purchase rather than a word of limitation.

An instrument which grants a life estate to the grantee and the remainder to his heirs brings the instrument squarely within the rule in Shelley's case, and therefore a fee simple title passes to the grantee. This rule must prevail even though the intention of the grantor is shown clearly by the instrument to have been otherwise.¹⁰

In all cases of a limitation of a freehold estate to one with remainder to his heirs generally the rule in Shelley's case applies, and confers the inheritance upon the ancestor; but

7—*Baker v. Scott*, 62 Ill. 86.

9—*Lehndorf v. Cope*, 122 Ill. 317.

8—*Butler v. Huestis*, 68 Ill. 594;

10—*Wilson v. Harrold*, 288 Ill. 388.

Hudson v. Hudson, 287 Ill. 286.

it has been abolished as to estates tail by the 6th section of the conveyance act. As to the limitations controlled by that section, the only use made by the rule is for the purpose of determining whether by the common law a fee tail would have been created. If it would, the person who would have been seized in fee tail is seized for his natural life only, and the remainder passes in fee simple absolute to the person to whom the remainder is limited.¹¹

So where there is a limitation to one for life, and then to another for life, with remainder in fee to the heirs of the first life tenant, the estate in remainder vests at once in the first life tenant. And this rule applies to equitable as well as legal estates.¹²

§ 1433. Interest of the Same Nature or Quality Essential in the Rule in Shelley's Case—It must be observed, that the several limitations to the ancestor and his heirs, must both give interest of the same nature or quality, either both legal or both equitable; and not one legal and the other in trust; and it has sometimes been said, the ancestor must not have the estate of freehold merely as a trustee.¹³

§ 1434. Importance of Thorough Knowledge of Rule in Shelley's Case—Preston, in his chapter on the Rule in Shelley's case, says: "The importance of a thorough knowledge of this rule will be evident, from the consideration, that the power of alienation by the ancestor, to the total or partial exclusion of his relatives falling under the denomination of his heirs, in the descriptive terms of the limitation which names them, to be ascertained through the medium, by the application of this rule."

"In those instances to which the rule applies, the ancestor has this power of alienation; for the inheritance is in him, and his children or other relations, so far as their right is founded on the limitation to his heirs, can claim

11—Winchell v. Winchell, 259 Ill. 471.

13—I Preston on Estates, 321.

12—Carpenter v. Hubbard, 263 Ill. 571; Bails v. Davis, 241 Ill. 536.

only in succession from him, and therefore, will be bound by his acts, while in those instances to which the rule does not apply, the children or other relations, falling under the denomination of heirs, have the title originally, in their own right, and as purchasers by that name, and do not claim through or under their ancestor, further than as persons described by means of his name and as his heirs; in other words, as the persons in whom this character is fulfilled, and therefore their ancestor, merely because he bears that relation to them, cannot, by his alienation, make a disposition to their prejudice."¹⁴

§ 1435. Rule in Shelley's Case Firmly Established as a Rule of Property—The rule is one of the most firmly established rules of property and is unshaken in this State. In determining whether it is applicable in a given case the question does not turn upon the *quality* of the estate intended to be given to the first taker, whether a life estate or more, but upon the *nature* of the estate intended to be given to the heirs, whether by inheritance or otherwise. When the heir takes in the character of heir he must take in the quality of heir, and all heirs taking as heirs must take by descent.¹⁵

The requisite limitations to the ancestor and his heirs being found, the rule must be applied. It can never be a question whether the rule shall be applied or not. We might as well ask whether the testator intended to contravene the rule against perpetuities. It will no more yield to individual intention than any other fundamental rule of property. The rule admits of no exception.

The only method by which an instrument employing the word "heirs" can be shown not to be within the rule, is by showing that the word was not employed in its strict legal sense.¹⁶

14—I Preston on Estates, 270.

16—Carpenter v. Van Olinder, 127

15—Bails v. Davis, 241 Ill. 536; Ill. 42.

Ward v. Butler, 239 Ill. 462; Dubois v. Judy, 291 Ill. 340.

§ 1436. Grant to Several, Remainder to Heirs of One—

Where there is a grant or devise to several for their lives with a remainder in fee to the heirs of one of them, the estate in remainder vests at once in the ancestor to whose heirs it purports to be given. The limitation to the heir must be to the heirs of a person taking a particular estate of freehold, but if it is confined to such heirs then it is immaterial whether there be several ancestors taking the particular estate or only one; nor whether their estates be several, provided they all take, or joint; nor whether the remainder be to the heirs of all or only of some or one of such ancestors; nor whether the estate to the ancestor be such as may possibly determine in the lifetime of such ancestor or not.

So where a deed was made to a man and his wife during their natural lives and after their death to the heirs of the husband it was held that the conveyance vested in the husband the whole title.¹⁷

§ 1437. Grant to One for Life with Remainder to Several in Fee—

Where a testator devised his real estate to his wife for and during her natural life, and on the death of his wife directed that her heirs have in fee simple the undivided half of said real estate, and his brother the other undivided half thereof to him and his heirs forever, it was held that as the requisites of the rule in Shelley's case as to the half that was given to the wife were all applicable, and as the brother took the fee in the other half, subject to the life estate of the wife, the title of the undivided half devised to the heirs of the wife after her death was vested in her in fee simple, and under the provisions of her will passed to her devisees.¹⁸

§ 1438. Legal Effect of Rule in Shelley's Case—Intention Disregarded—The rule to be observed in the application of the rule in Shelley's case is, if the language used

17—*Bails v. Davis*, 241 Ill. 536.

18—*Ward v. Butler*, 239 Ill. 462.

in a document brings it within the rule, the intention of the maker goes for naught, and its legal effect must control.¹⁹

Preston further says: "The rule is of positive institution, and has this circumstance of peculiarity and variance from rules of construction. Instead of seeking the intention of the parties, and aiming at its accomplishment, it interferes in some, at least, if not in all cases, with the presumable, and, in many instances, the express intention. In its very object the rule was leveled against the views of the parties. Hence, has arisen the great difficulty of deciding questions involving the consideration of the rule. To determine whether the operative force of the rule, or rules of construction which take the intention of the parties for their guide, shall prevail, is, in general, the point to be decided."

"It is to be seriously lamented that a line cannot be drawn so precisely as to enable a distinction to be clearly taken, discriminating those cases which are, from those cases which are not, objects of the rule. Every case must, in all instruments and especially in wills, depend, in a great measure, on its particular circumstances. The question in these cases will always be, which of the two rules, the one in Shelley's case, or the one which takes the intention for its guide, shall be applied to determine the legal effect of the several gifts to the ancestor and his heirs."²⁰

This rule is said to be a rule of property which overrides even the express intention of the testator or grantor that it shall not operate, or which rather raises a conclusive presumption that where a devise or grant is made to a man and his heirs, the testator or grantor intends to use the word "heirs" as a word of limitation and not of purchase. The express intention of the testator or grantor that the first taker shall take only for his life and no longer, and that he shall not have the power to sell the lands or make

19—*Griswold v. Hicks*, 132 Ill. 494.

20—I Preston on Estates, 271.

way with any part of the premises, will change the word "heirs" into a word of purchase.²¹

The rule, however, is not so strict as to control the manifest intention of the parties, if that intention is expressed so as to steer clear of the reason of the rule, or of its literal terms.²²

In a devise to one for and during his natural life with remainder to his heirs in fee, the inexorable rule of the common law, from which the courts cannot escape without legislative aid, requires them to set at naught the clearly expressed intention, and decide that the testator gave a fee simple title to the first taker, although he expressly limited it to a life estate by apt words. When, however, the testator has used other words, such as "child" or "children," the rule in Shelley's case has no application, and the court is left free to adopt a construction which will carry into effect the intention of the testator.²³

A devise of the income for the use of the devisee, or of the rents and profits of the land, is equivalent to a devise of the land itself, and will carry the legal as well as the beneficial interest therein. And where an estate for life is devised to a person with remainder over to his nearest heirs, brings the property within the rule in Shelley's case. The remainder is immediately executed in possession in the ancestor so taking the freehold. The conditions which must concur to the operation of the rule in case of a devise are: First, a freehold must be granted or devised; second, the estate of freehold must be taken by the same instrument which contains the limitation to the heirs, and for this purpose a will and codicil will be deemed one instrument; and third, the interest devised to the ancestor, and limited to the heirs, must be of the same quality.²⁴

It was urged in a certain case that the rule in Shelley's

21—Ward v. Butler, 239 Ill. 462.

22—I Preston on Estates, 275.

23—Connor v. Gardner, 230 Ill. 258.

24—Ryan v. Allen, 120 Ill. 648;

Forbes v. Forbes, 261 Ill. 424.

case did not apply and merge the fee in the life tenant, for the reason that the rule does not apply to trust estates. The court found no authorities supporting this position, and cites Perry on Trusts, as follows: "As trusts are wholly independent of tenure they ought not to be affected by the rule and a few cases seem to indicate that they are withdrawn from the operation of it; but it is now established that the same rule shall apply to the same limitation, whether it is of an equitable or a legal estate,"—citing numerous authorities, all apparently upholding the doctrine of the text, and this seems to be the general conclusion reached by the authorities.²⁵

§ 1438a. The Word "Heirs" Essential to the Rule in Shelley's Case—The rule in Shelley's Case applies only to limitations in which the word "heirs" is used, unless it can be clearly ascertained that the testator by the use of some other word meant heirs. The word "children" in a will does not ordinarily mean "heirs," so as to bring the devise under the operation of the rule in Shelley's case, unless the context of the will leaves no doubt of such intention. In a devise to one for and during his natural life, with remainder to his "child" or "children" in fee, the rule in Shelley's case has no application, and the court is left free to adopt a construction which will carry out the intention of the testator.²⁶

In a certain instrument a life estate was created in the ancestor and the remainder to "his lawful heirs of DeWitt County and State of Illinois." And it was urged that these words as used could still be said to make a particular description of the heirs the same as though the instrument had used the word "children," and the rule in Shelley's case did not apply. To this the court replies: "Apparently the original deed from Presley Williams and wife to Char-

25—Wilson v. Harrold, 288 Ill. 388.

26—Hanes v. Central Ill. Utilities Co., 262 Ill. 86.

ley Herrold was drawn on a printed form, and the proper erasures were not made in preparing the deed so as to erase the words "DeWitt County and State of Illinois," and these words referred to the place of residence of the grantee and have no relation to the word "heirs." They form no part of the words of conveyance and are really surplusage.²⁷

§ 1439. Origin of Rule in Shelley's Case—"The rule is, by some writers, deemed to be of feudal origin, or to be accounted for only on the principles of that system of tenures, and the consequential fruits of seigniority.

"After wardships, reliefs, and other incidents of tenure flowing from estates of inheritance, were introduced into the system, it was accounted a fraud upon the lord, who was entitled to these fruits and incidents on the death of his tenant and the succession of the heir, that there should be a power to give the property to the ancestor for his life only, and of extending the enjoyment to his heirs, provided they are his heirs, so that the heirs should be entitled precisely in the same manner as if they took by hereditary succession, and yet took as purchasers in their own right, and, as a consequence, defeat the lord of his fruits to which he would have been entitled on a succession from the ancestor.

"On this account, and with great reason, this rule is supposed to have been formed, in order to give the inheritance to the ancestor, so that the heir might take by hereditary succession, in the course of descent, and so that the lord might have the fruits of his seigniority.²⁸

"The reports of the old cases are silent on the reason of the rule, and leave it open to conjecture. Till the case of Shelley, or Mosley v. Shelley (1 Rep. 88), received its decision, very few cases had invited, or at least involved, a solemn discussion of the rule; and when that case first arose, the rule does not appear to have been understood

27—Wilson v. Harrold, 288 Ill. 388.

28—I Preston on Estates, 295.

or acknowledged as a general and universal position, perfectly settled and received as an axiom of law."²⁹

§ 1440. **Reason for the Rule in Shelley's Case**—As the rule in Shelley's case was first understood, it was that in case of a limitation as provided in the instrument, the estate was, in fact, to go to the heirs of the grantee or devisee named; and though the grantee had a right to enjoy it during his life, he had no right to cut off the descent by alienation; but when, in the progress of estates, the word "heirs" came to be regarded as a mere term of limitation, giving the grantee complete ownership, with the unrestricted right of alienation, it was not easy to distinguish between a case where a limitation was to one and his heirs, and to one where it was to him for life, and after his death, to his heirs; and the effect at common law being the same in both forms of limitation, the rule became firmly established. So as the reason presented defines the limits of the rule, it furnishes a clue to determine, in any given case, whether it is within the rule or not.³⁰

§ 1441. **Rule in Shelley's Case Not Applicable to Personal Property**—The Statute of Uses does not apply to personal property, and the provisions of a will in regard to bequests will not be affected by the statute if the devise be to one in trust for a beneficiary provided the trust can be regarded as a passive one. Neither does the rule in Shelley's case apply to personal property. That is a rule of property, and not of construction or intent, and is always given effect although directly at variance with the manifest intent of the grantor or donor. It is said, however, that while the rule, strictly speaking, has reference only to real estate, it is applied to grants of personalty, by way of analogy, for the purpose of construction, and when so applied yields more readily to the apparent intent of the grantor than it does to grants of realty, and the courts will

29—I Preston on Estates, 303.

30—I Wash. on Real Prop. 269.

carry out the intention of the testator as expressed in his will if it can be ascertained with a certainty.

Treating the rule in Shelley's case, when applied to personal property, merely as a rule of construction, if there can be no question as to the intent of the testator that an active trust and duties shall be performed by the trustees, then the inferences from the rule will not apply.

It is not essential to the power of a trustee to control and manage a trust fund that he should be given, in express terms, power to loan and invest the same and to collect the proceeds or income, if that intent can be gathered from the will. The provision in a will that the fund shall be used by the trustee for the sole use and benefit of the beneficiary during his life necessarily implies control and management of the fund, and the intent of the testator so expressed must be given effect.³¹

§ 1442. Distinction Drawn Between Deeds and Wills in the Application of the Rule in Shelley's Case—In the application of the rule in Shelley's case, there seems to be a distinction drawn between deeds and wills. It is said: "The heirs must in deeds be described by that word, and in wills by the same, or some such appropriated or substituted term, and as the class or denomination of persons, who are the legal successors of the ancestor, in a regular course of descent with a view to an estate in fee or fee tail to be derived from him."³²

§ 1443. Words of Limitation and Words of Purchase—The reader will notice that in the text books and reports frequent reference is made to the term "words of limitation" and "words of purchase," and that a distinction is drawn between them. What that distinction is becomes very important to understand in considering the title to real estate. After a very exhaustive research of the authorities on this subject, the best definition and exposition of these terms is found in Preston on Estates, and

31—Smith v. Smith, 254 Ill. 488.

32—I Preston on Estates, 322.

extensive quotations are made from that work. It is there said:

“The expression ‘words of limitation’ is always used in contradistinction to the expression, ‘words of purchase.’ By the former expression (words of limitation) it must be understood that the *interest* limited by these words is not originally given to the *heirs*, but to their *ancestor*, either mediately or immediately, or eventually; so as to create in him an estate or interest of inheritance descendable to his heirs, of the general description; and subject to the ownership under the gift, if any, interposed between the several limitations, when there is one to the ancestor, and another to his heirs, or heirs of his body.” By the latter expression (words of purchase) is meant such words as give the estate limited by the term “to the heirs,” originally in their own right, and as persons answering the description, and not through the medium of, or by descent from any ancestor, so that these heirs are the purchasers under the appellation of heirs, and are to take without any reference to a previous right of their ancestors, in whom the estate, to pass the limitation to the heirs, cannot vest, in any possible event.

A consequence is, that the power of alienation commences in the heirs, and not in the ancestor, and the heirs, unless their interest shall be defeated under the rules applicable to contingent remainders, will not be liable to the charges, or bound by the conveyances of the persons who, in point of fact, and in reference to other property, may be their ancestors.

“Admit that it is possible that the limitation to the heirs may in any event vest the estate in the ancestor, and the word heirs, etc., will be of limitation, and not of purchase. And when an ancestor has an estate of freehold, a limitation to his heirs may confer an interest on him, descendable to his heirs, though that interest can never vest in the ancestor himself.”

The only substantial difference between a limitation to A and his heirs, and a limitation to him for life, remainder to B in tail, remainder to the right heirs of A, is this: In the first instance A takes the entire fee, as one entire estate; and in the other instance he takes the fee in portions, divided by and subject to the estate tail in B.

“The words, *his heirs*, operate in each case as words of limitation, viz., words giving the estate imported by them to the ancestor of the heirs, and not originally to the express objects of the description. They extend the ancestor’s estate immediately in the one case, and mediately in the other case, so that the estate may be taken by the heirs by descent; and they limit the measure of the estate he is to take.”

“The words heirs, etc., operate only to expand an estate in the ancestor so as to admit the designated heirs, into its extent, and entitle them to take derivatively through or from him as a root of succession, or person in whom the estate is considered as *commencing*, in point of title, they are properly words of limitation. But when they operate only to give the estate imported by them to the heirs described *originally*, in and as the persons *in whom* the estate is to be commenced, in point of title, and not derivatively from or through the ancestor, they are properly *words of purchase*.

“Lord Coke very appositely refers the word purchase to the express object of the gift, viz.: heirs; and when such heirs originally acquire the estate by these words, he styles them words of purchase, otherwise not.

“In general, words of purchase are those by which, taken absolutely without reference or connection with other words, the estate first attaches, or is considered as commencing in point of title, in the person described by them; whilst words of limitation operate by reference to or in connection with other words, and extend or modify the estate given by such other words. This is evidently the line of distinction

adopted by Lord Coke, and which pervades the terms of the rule in question, and is in fact, admitted by all who do not deny that the word heirs, in the common limitation to a man and his heirs forever, is a word of limitation."³³

The author of this work was a famous English barrister, and the work was published in the year 1820, and doubtless stated the law as it then existed in England.

The term "heir" or "heirs of the body" has assigned to it, by judicial determination, its appropriate, peculiar and technical import and meaning, which is, that unless there is something in the instrument clearly excepting it from the general rule, and showing that it was not used with this technical import, that it is not a word of purchase nor a *designatio personae*, but is *nomen collectivum*, and used as a word of limitation, and would carry the land devised or conveyed not only to the immediate heir or issue, but to all those who descended from the devisee or grantee, or were his heirs under the statute of descent.³⁴

So a grant of land for a term of years to a grantee and after its determination then to his heir does not denote the duration of the term of the grantee but denotes who is to take the remainder on the expiration of the term, and is therefore called a word of purchase. Hence, words of purchase and words of limitation are opposed to each other.³⁵

Where the words "bodily heirs" are used in a conveyance or will, they have no other or different meaning than the word "heirs of his body."³⁶

Words of limitation are those which denote the extent and character of the estate granted to the first taker, while words of purchase are descriptive of the persons who are to take the property.³⁷

33—I Preston on Estates, 36-8.

36—Turner v. Hanse, 199 Ill. 464.

34—15 Am. & Eng. Enc. of Law, 320.

37—Aetna Life Ins. Co. v. Hoppin, 149 Ill. 406.

35—19 Am. & Eng. Enc. of Law, 334.

The word "heirs" in a deed or will is, ordinarily, a word of limitation, limiting the title conveyed; but the word may be used as a word of purchase, indicating the persons who are to take the title under the deed or will, and it always has that operation when it sufficiently appears that the word is used to designate a particular person or persons, who may stand in that relation at the happening of a certain event or at a certain period, and not to the whole line of heirs in succession. In case the word is used as a word of purchase, the person designated takes, not as an heir, but as the grantee or devisee in the deed or will.³⁸

The word "heirs" is a word of limitation when it is not used to describe individuals but to designate heirs generally, or the whole line of heirs in succession. It is not to be considered as a word of purchase, unless there are other controlling words showing an intention of that kind by the person using it, and if it is used as a word of limitation, its effect is to mark out the estate granted.³⁹

§ 1444. Effect of Words Determined by Circumstances and Conditions—It is extremely difficult to formulate and state a general rule as to when the word "heirs" will be considered as words of purchase and when the words "child," "children" or "descendants" will be considered as words of limitation.

The same words may under certain circumstances and conditions be considered as "words of limitation," and under other circumstances and conditions as "words of purchase." Preston says: "The material words in a clause of designation, more generally termed the clause of limitation, as to the heirs generally, or heirs of the body, are denominated, in some instances, words of limitation, in other instances, words of purchase.

"The same words may, under different circumstances, have different denominations. It is from the effect of the

38—Ebey v. Adams, 135 Ill. 80;
Chapin v. Crow, 147 Ill. 219.

39—Ortmayer v. Elcock, 225 Ill.
342; Dubois v. Judy, 291 Ill. 340.

words that the denomination arises. As often as the words do not more than mark the *nature, extent and continuance* of the estate, they are said to be words of limitation. When they limit the estate, and at the same time ascertain the description of the persons who are to take and are to vest the estate in the heirs, *in their own right*, they are said to be words of purchase; and though the same words at the same time, and by themselves, independently, ascertain the description of the person in whose favor the gift is to operate, and measure the duration of the interest to pass by the gift, they are said to be words of purchase, and are known by this single appellation."⁴⁰

§ 1445. The Word "Heirs" Sometimes Means "Children"—A testator by his will provided that the title to the lands of which he should die seized, should be vested in one of his sisters, naming her, by whom it was to be divided into four equal parts; one part to be retained by her, and one share to be given to each of three other sisters, naming them. The will contained this clause: "In case either of them shall be dead, leaving no heirs, then their share shall go to the sisters, or their heirs, who shall be living." Three of the four sisters named in the will died many years before the testator, and left no children or the descendants of children. The sister who was named in the will as trustee, survived him. At the time of his death the testator left two other sisters, one brother, three nephews and one niece, his only heirs at law. The surviving devisee, who was the trustee, filed a bill for the construction of the will, and the trial court decided that three-fourths of the estate should go to the heirs at law of the sister last deceased, generally. They were her collateral kindred. The complainant prosecuted a writ of error, contending that she was entitled to the whole estate, and that the word "heirs" in the will should be construed to mean "children." In this regard the court says: "The word 'heirs' is not always given its

40—I Preston on Estates, 35.

strict legal signification. When the word is used in such a way as to clearly indicate that it is intended to mean children, such meaning will be given to it, in order to carry out the testator's intention. In the will now under consideration the word 'heirs' evidently was used by the testator to mean children. If the intention was to include heirs generally, the sisters named as those who would take the entire estate upon the death of any of the four sisters would take only a part of the estate as collateral heirs. Such could not have been the intention of the testator. When he used the word 'heirs' he did not intend to include the sisters who would take the entire estate in case of the death of the other sisters named. Manifestly, what the testator had in mind was that he wanted his estate to be distributed to these four sisters, if they should survive him; that if a part of them survived him and a part did not, he intended that the survivors should take the entire estate unless the deceased sisters left children, in which case the children would be substituted in place of the mother. Nor do we think there is any ground for including the two sisters who were not named in the will, or their heirs, among those who would take in the event of the death of either of the sisters named. The testator intended that his estate should be distributed to these four sisters and the children of such of them as might be dead at the time of the testator's death. The plaintiff in error is the only survivor of the four sisters named in the will. The three who died before the testator left no children, consequently, the plaintiff in error is entitled to the whole estate, and the court erred in construing the will otherwise."⁴¹

The term "children," in its natural sense, is a word of purchase, and will be taken to have been so used unless so controlled and limited by other expressions in the instrument as to show that it was intended as a word of lim-

41—*Kalies v. Ewert*, 248 Ill. 612.

itation. So where a remainder is conveyed to the two sons of the life tenant, and providing that if one of the sons shall die leaving issue, one moiety shall go to the surviving son, and the other to the children of the deceased son, the children of the son dying before the termination of the precedent estate will take, not as heirs of the son dying, but as grantees in the deed.⁴²

A deed was made conveying certain premises to a mother "and her children born and to be born." The only children in existence at the time of the execution of the deed were two sons, and therefore these two sons were the only children of the mother who took title under the deed. The children born after the date of the deed took nothing. Hence, the mother and the two sons became the owners by the deed, each an undivided third of the premises.⁴³

But the word "children," however, when the context requires it in order to carry out the intent of the testator or grantor, has been construed to mean "heirs." There is no magic or particular force in certain words more than others; their operation must arise from the sense they carry. And where there are other words showing that the word "children" was used in the sense of "heirs," the word will be construed as a word of limitation equivalent to "heirs."⁴⁴

The word "heir" or the phrase "heir-at-law" means at common law that person who succeeds to the real estate in case of intestacy. With respect to personalty, too, it is often doubtful whether the testator employs the term "heir" in its strict or proper acceptation, or in a more lax sense as descriptive of the person or persons appointed by law to succeed to property of this description. Where the gift is to heirs by way of substitution, the latter construction generally prevails. It has frequently been held

42—*Chapin v. Crow*, 147 Ill. 219.

43—*Miller v. McAllister*, 197 Ill. 72.

44—*Dick v. Bicker*, 222 Ill. 413;

Bagshaw v. Spencer, 2 Atkyns, 577;

Strawbridge v. Strawbridge, 220 Ill.

61.

by the courts of this State that the word "heirs" in a will does not necessarily have a fixed meaning. It may mean children. If it may mean children, it may also, where there are no children, mean some other one class of heirs, if the context of the entire will plainly shows such to have been the purpose of the testator. The technical meaning of the word is the one which *prima facie* should prevail, yet such meaning will not be given effect to the extent of defeating an obvious general intention of the testator. "Heirs" and "heirs-at-law" are in a legal sense the same. The term "heir" has a very different signification at common law from what it has in those States and countries which have adopted the civil law. In the latter the term applies to all persons who are called to the succession, whether by act of the party or by operation of law. The person who is created universal successor by will is called the testamentary heir, and the next of kin by blood is, in cases of intestacy, called the heir at law or heir by intestacy. By the general rule in this country in the disposition of realty, in the absence of a contrary intention expressed in the will, the term "heirs-at-law," "heirs" or the like, must be construed in its strict and primal meaning, signifying those entitled by law to inherit by descent the real estate of a deceased person; and the same rule seems to apply quite generally to the disposition of personal property, unless there is an express reference in the will to the personal property being distributed according to the statute on distributions in force in that jurisdiction.⁴⁵

So where a conveyance is made to certain trustees in trust for a married woman, before the married woman's act was passed, "and her children" it was held that the words "and her children" were words of purchase and not of limitation, but were to be read conjointly with the name of the mother, and that the transaction, being in the nature of a family settlement, provision was intended to be

⁴⁵—Walker v. Walker, 283 Ill. 11.

made for after born children as well as those in being at the time of the transaction. In such case the trustees hold also for the benefit of any children that may thereafter be born.⁴⁶

Where a devise is made to a person and his children, it may mean any one of three dispositions: (1) that the devisee named should take the whole estate; (2) that the devisee should have a life estate, and the remainder in fee to his children; (3) that the devisee named, and his children, should take jointly, or as tenants in common. The word "children" in a will does not ordinarily mean "heirs" or "heirs of his body" so as to bring the devise under the rule in Shelley's case, unless the context in the will leaves no doubt of such intention. The word "heirs" is a word of limitation and not of purchase, and when used in a will its legal intendment is to designate a class of persons who are to take in succession, from generation to generation, and the law effectuates this purpose by declaring a fee to pass to the first taker, or, as it is sometimes expressed, by giving a life estate to the first taker and a limitation in fee to himself. The words "sons," "daughters," "child" and "children" are not technical, legal terms, to which a fixed and determined meaning must be given, regardless of the sense in which they are employed, but they are flexible and subject to construction, to give effect to the intention of the testator.⁴⁷

§ 1446. Fee Tail Changed to Life Estate, Remainder in Fee to Successor—Statute—"In cases where, by the common law, any person or persons might hereafter become seized, in fee tail, of any lands, tenements or hereditaments, by virtue of any devise, gift, grant or other conveyance, hereafter to be made, or by any other means whatsoever, such person or persons, instead of becoming seized thereof in fee tail, shall be deemed and adjudged to be, and become seized thereof, for his or her natural life only, and the re-

46—Dean v. Long, 122 Ill. 447.

47—Connor v. Gardner, 230 Ill. 258.

remainder shall pass in fee simple absolute, to the person or persons to whom the estate tail would, on the death of the first grantee, devisee or donee in tail, first pass, according to the course of the common law, by virtue of such devise, gift grant or conveyance."⁴⁸

There are many cases in which Section 6 of the Conveyance Act has been applied to the construction of conveyances which would by the common law have created an estate tail. In such cases the courts have held that the first tenant became seized of a life estate and the remainder vested in fee simple in the person or persons who were in the class of persons to whom the estate tail might first pass on the death of the first grantee, as soon as such person or persons came into being. This is the settled construction of the statute.⁴⁹

Where a testator devises lands to his widow and the heirs of her body, under section 6 of the statute in relation to conveyances, the devise will vest in her only a life estate, with remainder in fee to the heirs of her body, leaving the reversion, in case of an entire failure of issue, to the heirs of the devisor.⁵⁰

§ 1447. Estate Tail at Common Law Defined—An estate tail is where lands and tenements are given to one and the heirs of his body to be begotten and it may be either general or special.⁵¹

The authorities have always held that in order to create an estate tail, words of inheritance as well as words of procreation are necessary. As the word "heirs" was under the common law necessary to create a fee, so, in further limitation of the strictness of federal donation, the word "body" or some other word of procreation is necessary to make a fee tail and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of in-

48—Sec. 6, Ch. 30, R. S.

50—Lewis v. Pleasants, 143 Ill. 271.

49—Aetna L. I. Co. v. Hoppin, 249 Ill. 406; Bowlin v. White, 244 Ill. 623; Hickox v. Klahold, 291 Ill. 544.

51—Butler v. Huestis, 68 Ill. 594.

heritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate tail.⁵²

At common law, a conveyance to a person and the heirs of his body, whether general or special, created a conditional fee, which was held to be performed and the fee vested upon the birth of issue. It was held that there was an implied condition that if the donee should die without such heirs, the land should revert to the donor. This was a condition annexed to all grants, by operation of law, that on the failure of the heirs specified in the grant, the grant should be at an end and the land return to the ancient proprietor. The condition annexed to these fees by the common law, was held, where it was to a man and the heirs of his body, to be a gift on condition that it should revert to the donor if the donee had no heirs of his body; but if he had, then it should remain to the grantee. Hence, it was called a fee simple, on condition that he had issue. And where the condition was performed by the birth of issue, the estate in the grantee became absolute and unconditional. And when the condition was thus performed by the birth of issue, the estate became absolute for at least three purposes. First, to enable the grantee to alien the land, and thus bar not only his own issue but also the donor; second, to subject him to forfeiture of it for treason; third, to empower him to charge the lands with rents, commons and certain other incumbrances. If after such performance of the condition the grantee did not alien the land, and the heir died and then the grantee died, the estate reverted to the donor. To obviate this reversion it was customary for the grantee, on the birth of issue, to alien and then repurchase, so that he might become vested with a fee simple absolute that would descend to his heirs generally. This was the state of the law when Parliament adopted the statute *de donis conditionalibus*.

52—Dick v. Ricker, 222 Ill. 413.

The effect of this statute was to prevent the grantee from aliening, after the birth of issue, so as to cut off or bar this estate, which descended in like manner, from generation to generation, to the class of heirs described in the deed to the first donee. But on a failure of issue the land reverted to the donor. It was held that by this act the estate was divided into two parts, leaving in the donee a new kind of particular estate called a fee tail, and investing the donor with the ultimate fee simple in the land, expectant on the failure of issue, which expectant estate was called a reversion.

And it was obviously the purpose of the General Assembly in adopting the sixth section, to prevent the tying up of titles in perpetuity by entails. This was manifestly the first purpose, and another was, to carry out the intention of the grantor in making the conveyance, that the land should go in remainder to the particular persons designated in the deed. The artificial and highly technical rules of the people generally, or by a majority of the persons who are called upon to prepare conveyances, and, hence, it was also the purpose of the statute to more effectually carry out the intention of the parties.

The General Assembly, in adopting the sixth section of our Conveyance Act must have intended to refer to estates tail created by the statute of *de donis*. They speak of persons becoming seized of such estate by the common law, when it is seen that estates tail grew out of the statute *de donis* and not out of the common law. The object of our statute was, to convert the estate tail in the donee into an estate for life, and in the person who would first take under the grant into an estate in fee simple absolute, and thus cut off the reversion to the donor, except on the failure of issue in donee of the class designated in the instrument conveying the land, and to vest the fee in the first taker. This seems to be the obvious purpose of the statute, and

not to restore the common law as it stood before the adoption of the statute *de donis*.

This provision repeals, in the most unmistakable manner, any and all inferences that the donee might bar the remainder, or that the donor should ever have the reversion, except on the failure of issue, but that the estate in the heir of the body of the donee should take a fee untrammelled and free from all conditions whatever.⁵³

§ 1448. Origin and Creation of Estates Tail—Estates tail came into general use upon construction by the courts of the statute *de donis conditionalibus*. (13 Edw. I, C. L., Sec. 1.)

Estate in fee tail were of two kinds: (1) Estates tail in general as where the grant was to one and the heirs of his body generally, so that his issue in general, by each and all marriages, are capable of taking *per formam doni*. (2) And estates tail special where the gift or grant was restricted to certain heirs, or class or heirs, of the donee's body. In the creation of a fee tail estate, there must be words of procreation, indicating the body out of which the heirs were to issue, or by whom they were to be begotten. The ordinary form was to make the gift or grant to the donee or grantee, "and the heirs of his body," or "her heirs upon her body to be begotten," or "upon her body to be begotten by A." But there was no special efficacy in the particular form of words; it was requisite, only, that in addition to the word "heirs," the description of the heirs should be such that it should appear that they were to be the issue of a particular person.⁵⁴

By a certain will the testator devised unto his daughter and the heirs of her body, and to their heirs and assigns, all his real estate; and in case his daughter should die without issue, then the real estate was devised to his brothers and sisters and their heirs and assigns. On a bill filed by

53—*Frazer v. Supervisors*, 74 Ill. 282.

54—*Lehdorf v. Cope*, 122 Ill. 317; 2 Black. Com. 114.

the daughter for the construction of the will it was said by the court, that under the ancient English tenures, where a person conveyed real estate to another and the heirs of his body, it was held, that the grantee took only a conditional fee, and in the event of his death without heirs, the title returned to the grantor. But to enlarge the estate, and free it from reverter it came to be held that, as soon as an heir of the body of the grantee was born, the condition was performed, and if he then sold he could pass the fee, and thus bar the reversion, and cut off any title that might have vested in the heir. But this rule was changed by the statute of 13, Edw. I, Ch. I, commonly called the statute *de donis conditionalibus*. That statute enacted that from thenceforth the will of the donor be observed, and the tenements so given to a man and the heirs of his body should at all events go to such issue, if there were any, or if none, should revert to the donor. And in construing this statute the courts held that the donee had no longer a conditional fee, which became absolute on the birth of issue, but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they called a "fee tail," and vesting in the donor the unlimited fee simple of the land expectant on the failure of issue, which expectant estate is now called a reversion.

Let us now inquire how an estate tail is created. Blackstone informs us that as the word "heirs" is necessary to create a fee, so, in further limitation of the strictness of the feudal donation, the word "body," or some other word of procreation, are necessary to make it a "fee tail," and ascertain to what heirs in particular the fee is limited. The words employed in the will or deed fall within the requirements of the law to create an estate tail general.

Then what, under this law, as it stood independent of the statutory enactment by our General Assembly, was the estate devised to the daughter? According to all authorities, a donee in a fee tail acquired by a life estate in effect; but

he was not impeachable for waste committed on the estate, by felling timber, pulling down houses and the like; that his wife should have dower of the estate, or the husband of a female tenant may be tenant by the curtesy. But the estate could be destroyed, and the title of the heir barred by a fine, by a common recovery, or by lineal warranty, descending with assets to the heir. But in no other manner could the donee sell and convey the property so as to deprive the heir of an estate in the property similar to that of the ancestor. And independent of our statute, the devisees and the heirs of her body would have taken and held an estate tail, according to the provisions of the statute of Westminster.

The sixth section of our Conveyance Act has unmistakably defined the interest of the daughter, under the devise in her father's will, to be a simple life estate, with remainder over to the heirs of her body in fee simple absolute. Hence, the limitation is valid and binding, both under the common law and our statute, and the limitation to her heirs is valid and binding.⁵⁵

Where a will devises all the property of the testatrix to her husband to have and to hold the same unto my or our son's his heirs and assigns forever, the only meaning which can be given the language of the will is that it gave the property to the surviving husband, with a limitation to the heirs of the bodies of the testatrix and her husband. By section 6 of the Conveyance Act an estate in fee tail becomes an estate for the natural life of the husband with remainder in fee simple absolute to said heirs. This is the only method by which effect could be given to the language of the will, and make it operative as a will.⁵⁶

It is a misapprehension, in construing Section 13 of the Conveyance Act, to hold the words in a certain deed, "and her heirs by her present husband" following the grant

55—Blair v. Vanblareum, 71 Ill. 290; Kyner v. Boll, 182 Ill. 171.

56—Anderson v. Anderson, 191 Ill. 100.

to the grantee should be rejected, and the deed read as to her only. The evident purpose of the section referred to was to change the rule of the common law, whereby, if a conveyance was made without words of inheritance, an estate for the life of the grantee only was created. It is not necessary that, to create a less estate than the fee, there should be express words of limitation, either under the statute or the common law. It is sufficient for that purpose if it appear, by necessary implication, that a less estate was granted. An estate to "A and the heirs of her body" is the same as an estate to "A for life, remainder to the heirs of her body." A grant to "A and the heirs of her body," by operation of law creates an estate tail in A, remainder in tail. This has been the uniform holding. So it is apparent, if at the common law, by virtue of a conveyance, the grantee would take an estate tail, whether an estate tail general, or an estate tail special, the 13th section of the Conveyance Act would be inoperative, and by virtue of section 6, the grantee would be seized of an estate for life, with remainder in fee to those to whom the estate is immediately limited.⁵⁷

§ 1449. Statute Regarding Fees Tail Strictly Construed—Where a deed is executed to: "Franklin B. Hoppin and Sarah Hoppin, his wife, for and during their natural lives and for and during the life of the survivor of them, and at the death of the survivor of them to the heirs of the body of said Sarah Hoppin, their heirs and assigns," it was held that Section 6 had no application, because it refers only to cases where, by the common law, any person or persons might hereafter become seized in fee tail, and the foregoing grant was not such a case. The grant was of a life estate, and the remainder is not granted to the heirs of the life tenant, either in tail or in fee simple. The grant is not in fee simple, because it is not granted to the general heirs,

⁵⁷—Lehndorf v. Cope, 122 Ill. 317;
Peterson v. Jackson, 196 Ill. 40.

but to a restricted class; it is not a fee tail, because the heirs to whom the estate is restricted take in fee simple. The construction of the deed is not affected by the rule in Shelley's case, or by section 6 of the Conveyance Act. The words "heirs of the body," as used in the deed, are not words of limitation, denoting the extent and character of the estate granted to the first taker, but are words of purchase, descriptive of the persons who are to take the remainder upon the termination of the life estate.

Section 6 of the Conveyance Act abolishes estates tail, and with them the rule in Shelley's case as applied to such estates. That rule applies in this State only to fees simple. Under the operation of this rule, in such jurisdictions where it is in force as to estates tail, a conveyance to one for life with remainder over to the heirs of his body, and the first taker has an estate in tail which is an estate of inheritance. In this State, however, where the rule is not in force as to estates tail, the conveyance operates according to its terms, and the first taker has a life estate only.⁵⁸

§ 1450. The Rule in Wild's Case—This rule does not appear to be mentioned either in Washburn on Real Estate or in the Am. & Eng. Encyclopedia of Law. Yet it is a rule of property recognized in Illinois. It is a rule which seems to have been established by a decision in 6 Coke, 16-17.

In that case there was a devise to "Wild and his wife, and after their decease to their children." And it was resolved that according to the rules of the common law, Wild and his wife took a life estate, with remainder to their children for life and not an estate tail as has been contended. In the decision of the case it was said that for as much as by the judgment of the common law, on like words in a conveyance, it would be but an estate for life, the remainder to their children for life, thence it follows that the intent, and not the words, of the deviser, ought to make it an estate tail in

⁵⁸—Aetna L. I. Co. v. Hoppin, 249

Ill. 406.

this case. Then this intent ought to be manifest and certain and so expressed in the will, and in this case no such intent appears, and therefore this difference was resolved for good law: That if "A" devises his lands to "B" and to his children or issue, and he hath not any issue at the time of the devise, the same is an estate tail for the intent of the devisor is manifest and certain that his children or issue should take; and as immediate devisees they cannot take because they are not *in rerum natura*, and by the way of remainder they cannot take, for that was not his intent, for the gift was immediate; therefore, such words shall be taken as words of limitation, as much as children or issue of his body. But if a man devises lands to "A" and to his children or issue, and he has issue of his body, there his express intent may take effect according to the rules of the common law and no manifest or certain intent appears in the will to the contrary, and, therefore, in such case they shall have but a joint estate for life.

It would seem that the decision in the Wild's case was controlled by the rules of the common law in regard to life estates, and in the case first put, the judges enlarged what would be only a life estate at common law into an estate tail by construction. Under the common law the courts resorted to a construction to give as large an estate as possible.

But our statute expressly provides that words of inheritance shall not be necessary to carry a fee. (Sec. 13, Ch. 30, R. S.) It is not necessary, therefore, to resort to construction to give a larger estate than the strict rules of the common law would give. The statute gives the larger estate, unless the contrary appears. This being so, the rule in the Wild's case is no longer necessary, for it would cut down the estate, and not enlarge it as it was intended to do. So where under our statute a will gives what will be construed to be a fee simple, to take effect on the death of the testator, the title vests in the devisees (two daughters and

their children), and no children having been born to them the will becomes inoperative as to "their children," and they take an estate in fee.⁵⁹

§ 1451. Statute Form of Conveyances—The statute has prescribed certain forms for warranty deeds, quitclaim deeds, and mortgages and declared the effect thereof. The nature and character of these forms and the construction which has been given to them by the courts may well be considered here. It may be remarked that these forms are not intended to supplant the old common law forms of conveyances.

§ 1452. Statutory Form of Warranty Deed—Statute—"Deeds for the conveyance of land may be substantially in the following form: The grantor (here insert the name or names and places of residence), for and in consideration of (here insert consideration) in hand paid, conveys and warrants to (here insert the grantee's name or names), the following described real estate (here insert description); situated in the County of ———, in the State of Illinois.

Dated this — day of — A. D. —.

A. B. (L. S.)" ⁶⁰

§ 1453. Effect of Statutory Deed—Statute—"Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple, to the grantee, his heirs or assigns, with covenants on the part of the grantor, (1) that at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were free from all incumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same. And such covenants shall

⁵⁹—Davis v. Ripley, 194 Ill. 399;
Boehm v. Baldwin, 221 Ill. 59.

⁶⁰—Sec. 9, Ch. 30, R. S.

be obligatory upon the grantor, his heirs and personal representatives as fully and with like effect as if written at length in such deed.”⁶¹

A conveyance, in the statutory form of a warranty deed, must by the terms of the statute, be held to contain a covenant that at the time of the making and delivery thereof, the grantor was “lawfully seized of an indefeasible estate in fee simple in and to the premises therein described, and had good right and power to convey the same.”

This is more comprehensive than the ordinary covenant of seizin as used in common law conveyancing, and is not satisfied by seizin in fact, or actual possession by the grantor and a delivery of such seizin or possession to the grantee. The statutory covenant of seizin is in legal effect a covenant of title, and though the maker of such covenant puts the covenantee in possession of the premises conveyed, yet, unless by his deed he invests him with an indefeasible title in the premises, his covenant is broken, and the covenantee has the right to at once bring his action for the breach thereof.⁶²

The words “convey and warrant” in a deed of conveyance of land are to be construed and held as a covenant by the grantor that the premises conveyed were at the time of the execution of the conveyances free from all incumbrances.⁶³

§ 1454. Section 9 to Be Read in Connection with Section 13 of the Statute—Merely because a deed is substantially in the form prescribed by section 9 of the conveyance act, however, a fee simple is not necessarily conveyed. That section prescribes the form of a deed, and provides that every deed substantially in that form shall be deemed and held to be a conveyance in fee simple to the grantee; but it must be construed in connection with section 13 of the same chapter, under which, if a less estate be limited by express

61—Sec. 9, Ch. 30, R. S.

63—Dalton v. Taliaferro, 101 Ill.

62—Clapp v. Herdman, 25 Ill. App. App. 592.

words or appear to have been granted, conveyed or devised by construction or operation of law, the conveyance, not using words heretofore necessary to transfer an estate of inheritance, shall be deemed to convey a fee simple estate.⁶⁴

§ 1455. Pleadings and Practice on Breach of Covenant in Statutory Deed—In an action for breach of covenant in a statutory warranty deed, it is not necessary to allege and prove an ouster or eviction; it is sufficient to negative the words of the covenant and to prove that the grantor did not have title to the land at the time of conveyance.

In an action for breach of covenant contained in a statutory warranty deed for a failure of title the burden of which is upon the plaintiff to establish the fact that the outstanding title was paramount. So where the outstanding title is a tax deed, and the proof shows a valid precept, judgment and affidavit, upon which ejectment could have been maintained against the grantor at the time he conveyed the lot, and against the grantee at the time he purchased the tax title, the validity of the tax title is established.

The collector's return is *prima facie* evidence of the legality of the tax and of its assessment and levy, and that the tax is due and unpaid. And where there is no contrary evidence, this *prima facie* proof furnished by the collector's report furnishes sufficient evidence of the assessment and the amount of the tax.⁶⁵

§ 1456. Measures of Damages on Breach of Warranty in Statutory Deed—For an action for a breach of a covenant contained in a statutory form of a warranty deed, where the grantee was obliged to purchase a valid outstanding tax deed, the question arises, what is the measure of damages?

For a total breach, the damages is the amount of the consideration money and interest; but if the grantee has lost

⁶⁴—Cover v. James, 217 Ill. 309.

⁶⁵—Clapp v. Herdman, 25 Ill. App. 509.

less, the damages are limited to the loss sustained. Where a valid outstanding title has been bought in by the covenantee, the amount reasonably paid for it provided it does not exceed the purchase money paid to the covenantor, is held by the authorities to be the proper limit. And where there is evidence that the amount paid for a tax title is fair and reasonable the jury are justified in finding for the plaintiff damages for the amount so paid.⁶⁶

§ 1457. Statutory Form of Quit Claim Deeds—Statute—“Quitclaim deeds may be, in substance, in the following form:

“The grantor (here insert grantor’s name or names and place of residence), for the consideration of (here insert consideration), convey and quitclaim to (here insert grantee’s name or names), all interest in the following described real estate (here insert description), situated in the county of —, in the State of Illinois.

Dated this — day of —, A. D. —.

§ 1458. Effect of Statutory Form of Quit Claim Deed—Statute—“Every deed in substance in the form prescribed in this section, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance, release and quitclaim to the grantee, his heirs and assigns, in fee of all the then existing legal or equitable rights of the grantor, in the premises therein described, but shall not extend to after acquired title unless words are added expressing such intention.”⁶⁸

A quitclaim deed amounts to an assignment of all the grantor’s interest in the land of every name and character, including a claim for taxes paid by him.⁶⁹

A quitclaim deed is as effectual to pass title, and covenants running with the land, as is a deed of bargain and

66—Clapp v. Herdman, 25 Ill. App. 509.

67—Sec. 10, Ch. 30, R. S.

68—Sec. 10, Ch. 30, R. S.

69—Glos v. O’Toole, 173 Ill. 366.

sale, with covenants of warranty, if there be no words restricting its meaning.⁷⁰

Such a deed conveys all the interest of the grantor shown by the public records.⁷¹

In a certain case it was urged that a quitclaim deed did not purport to convey the title to the land, but only to convey such title as the grantor holds, and where the grantor had previously conveyed the lands no title could pass by the quitclaim deed. But this proposition was rejected by the court, saying: "A deed of release and quitclaim is as effectual for the purpose of transferring title to land as a deed of bargain and sale; and the prior recording of such a deed will give it a preference over one previously executed. In respect to the recording of deeds there is no distinction between different forms of deeds." * * *

Where a party has once conveyed lands, and afterwards executes a quitclaim deed, where the terms of the second deed do not necessarily embrace the lands previously conveyed, and, on the contrary, are such as to show it was not the intention of the grantor to include them, as where such expressions are used as "except such as have previously been conveyed," the courts will give such a construction as not to embrace them.⁷²

The statute has not in terms declared when and under what circumstances a release shall be given, or what shall be its effect, when executed by a remainderman to a life tenant in possession, and in the absence of such a declaration, resort may properly be had to the common law. At common law a contingent remainder could not be conveyed to another by deed of grant, but it is said, however, that a fine, before fines were abolished, could effectually bar a contingent remainder. It might also be released; that is to say the party entitled to a contingent remainder might, by

70—*Butterfield v. Smith*, 11 Ill. 485; *Morgan v. Clayton*, 61 Ill. 35; *Hamilton v. Doolittle*, 37 Ill. 473.

71—*Barton v. Mayers*, 183 Ill. 360.
72—*Brown v. Banner, C. & C. O. Co.*, 97 Ill. 214.

a release deed give up his interest for the benefit of the reversioner, in the same manner as if the contingent remainder to him and his heirs had never been limited, for the law, while it tolerates conditions of re-entry and contingent remainders, always gladly permits such rights to be got rid of by release, for the sake of preserving unimpaired such vested estates as might happen to be subsisting. So where a quitclaim deed is also a release, it will be given that effect.⁷³

The possibility of a reverter does not pass to the grantee in a quitclaim deed.⁷⁴

A deed of release and quitclaim is as effectual for the purpose of transferring title to land as a deed of bargain and sale.

The prior record of a quitclaim deed will give it a preference over a deed previously executed, but which is subsequently recorded. In this respect there is no distinction between different forms of conveyances. As a general rule, the one first recorded must prevail over one of older execution, when made in good faith, and when it appears to have been the intention of the parties to convey again the same lands which had been previously conveyed. But where the terms of the second deed do not necessarily embrace the lands previously conveyed, and are such as to show the intention of the grantor was not to convey them, the court will give it such construction as not to embrace them, and will not allow it to operate to the prejudice of the first purchaser.⁷⁵

§ 1459. Quit Claim Deed as a Deed of Release—A deed wherein the grantor recites that he “has remised, released, sold, conveyed and quitclaimed, and by these presents does remise, release, sell, convey and quitclaim, unto the party of the second part, his heirs and assigns forever, all the right, title, interest and claim” is not only a quitclaim deed but also a deed of release.⁷⁶

73—Williams v. Esten, 179 Ill. 267.

74—North v. Graham, 235 Ill. 178.

75—McConnell v. Reed, 5 Ill. 117.

76—Williams v. Esten, 179 Ill. 267.

§ 1460. Statutory Form of Mortgage—Statute—“Mortgages of lands may be in the following form, substantially:

“The mortgagor (here insert name or names), mortgages and warrants to (here insert name or names of the mortgagee or mortgagees), to secure the payment of (here recite the nature and amount of indebtedness, showing when due and the rate of interest, and whether secured by note or otherwise), the following described real estate (here insert description thereof), situated in the County of —, in the State of Illinois.

Dated this — day of —, A. D. —.

A. B. (L. S.)”⁷⁷

§ 1461. Effect of Statutory Mortgage—Statute—“Every such mortgage, when otherwise properly executed, shall be deemed and held a good and sufficient mortgage in fee to secure the payment of the moneys therein specified; and if the same contain the words ‘and warrants,’ the same shall be construed the same as if full covenants of seizin, good right to convey against incumbrances, of quiet enjoyment and general warranty, as expressed in section 9 of this Act, were fully written therein; but if the words ‘and warrants’ are omitted, no such covenants shall be implied.”⁷⁸

§ 1461a. School and Canal Land Certificates Assignable—Statute—“Purchasers of school or canal lands or town lots may, by endorsement in writing on their certificate of purchase, transfer and assign all right and title to the lands or lots purchased, or transfers or assignments of such certificates may be made upon a separate paper, and the transferees or assignees may in like manner transfer and assign all such certificates; and in all cases where certificates have been or shall hereafter be transferred or assigned, patents shall issue in the name of the last transferee or assignee.”⁷⁹

It may be well here to note what the Supreme Court has said in regard to such lands:

⁷⁷—Sec. II, Ch. 30, R. S.

⁷⁹—Sec. 15, Ch. 30, R. S.

⁷⁸—Sec. II, Ch. 30, R. S.

School Lands.—The act of Congress of 1822, authorizing the State of Illinois to survey through the public lands belonging to the general government, the route of a canal to connect the Illinois river with Lake Michigan, and reserving forever from sale a strip of land ninety feet wide on each side of the canal, such reservation does not apply to Sections 16, because these sections were not public lands at the time of the passage of the canal act but had been granted to the State for school purposes, prior to the passage of the canal act.⁸⁰

By an Act of Congress, passed March 30, 1822, the State of Illinois was authorized to survey and mark through the public lands of the United States the route of the canal connecting the Illinois river with the southern bend of Lake Michigan. Said act granted the State of Illinois ninety feet on each side of the canal, subject to certain conditions in the act specified. The Act of 1822, reserved every section of land through which the canal should pass from future sale until further directed by law, and the State of Illinois was authorized to use any materials on the public lands adjacent to the canal that might be necessary for its construction. By a subsequent act, passed March 2, 1827, for the purpose of aiding the State of Illinois in opening a canal to unite the waters of the Illinois river with those of Lake Michigan, the United States granted to the State of Illinois a quantity of land equal to one-half of five sections in width on each side of the canal, reserving each alternate section to the United States to be selected by the commissioner of the land office under the direction of the President of the United States, from one end of said canal to the other. Said lands were subject to the disposal of the legislature of the State for the purpose aforesaid, and for no other.

The act of Congress provided that as soon as the route

80—Trustees of I. & M. Canal v. Haven, 10 Ill. 548.

of said canal shall be located and agreed upon by the State of Illinois, the Governor, or the person authorized to superintend the construction of said canal, should examine and ascertain the particular sections to which the State was entitled under the grant and report the same to the Secretary of the Treasury of the United States. Section 3 of the act provided that the State of Illinois, under the authority of the legislature thereof, after the selection shall have been made, shall have power to sell and convey the whole or any part of said lands, and to give title in fee simple therefor to whomsoever should purchase the whole or any part thereof. By an act of the Illinois legislature the State conveyed to the trustees of the Illinois and Michigan canal "all the remaining lands and lots belonging to said canal fund, or which may hereafter be given, granted or donated by the general government to the State to aid in the construction of said canal."

There is no description in any of the acts of the legislature of the particular sections which passed to the state by the act of Congress above referred to. Under the act of Congress the state was granted each alternate section in a strip five sections wide on each side of the canal, to be designated or selected by the Governor of the State, or the person authorized to superintend the construction of said canal, which ascertainment and selection were to be reported to the Secretary of the Treasury, and the power of sale by the state was only given "after the selection shall have been made."

Until the selection was made by the state and reported to the Secretary of the Treasury of the United States there could be no certainty as to the particular section of land falling within the grant, nor could the title to any particular section vest in the state.

It has been held that a grant of land to a state by the United States, in aid of the construction of a railroad, of every alternate section designated by odd numbers, for six

sections in width on each side of the railroad, was a mere floating grant, and did not vest title to any particular section on the line of the road until the road was permanently located. In the case of the grant to the State of Illinois to aid in the construction of the Illinois and Michigan canal the grant was each alternate section to be selected in the manner already pointed out. Until such selection was made the state had no power to convey. So where the abstract submitted failed to show what lands had been selected by the state under the grant there is a failure to show title out of the United States.⁸¹

The court will presume, after a long lapse of time, under peculiar circumstances, that a certificate of sale of land by the county was duly given, and that the consideration for such certificate has been paid by the party to whom it was issued.⁸²

The statutes in regard to the sale of school lands and the method of making title thereto is well stated in the case of *People v. Auditor*, 3 Ill. 567.

§ 1462. Deeds of Counties—Statute—"The county board of any county may authorize any officer or member of its board to execute and deliver all deeds, grants, conveyances and other instruments in writing, which may become necessary in selling, transferring or conveying any real estate belonging to its county and such deed grants, conveyances and other instruments, if made without fraud or collusion, shall be obligatory upon the county to all intents and purposes."⁸³

The several records of orders and memoranda of the county commissioner's court, are a sufficient writing and signing by the party to be charged therewith, to take a case out of the statute of frauds and sufficiently mutual and certain in the description of, and as to, what property was sold, to be capable of a specific performance in a court of equity.⁸⁴

81—*Koch v. Streuter*, 232 Ill. 594.

83—Sec. 16, Ch. 30, R. S.

82—*Jefferson County v. Ferguson*,
13 Ill. 33.

84—*Bourland v. Peoria County*, 16
Ill. 538.

The state was invested with the title to all swamp and overflowed land within its boundaries by the act of Congress of 1850, and all swamp and overflowed lands were granted to the counties within their borders by the state in 1852. So where the deed is executed by the chairman of the board of supervisors, and it recites the authority given him by the board, and that the land was swamp and overflowed land situated within the county and the deed was given in execution of the power, that is all that is necessary to authorize it to be admitted in evidence. It is not necessary to show that the lands were classified as swamp and overflowed lands.⁸⁵

§ 1463. Conveyance by Plats and Subdivisions—The statute provides a method for platting and subdividing property, and when such plat is in accordance with the provisions of the statute, “the acknowledgment and recording of such plat shall be held in law and equity to be a conveyance in fee simple of such portions of the premises as are marked or noted on such plat as donated or granted to the public, or any person, religious society, corporation or body politic, and as a general warranty against the donor, his heirs and representatives to such donee or grantee for their use or for the use and purpose therein named or intended, and for no other use or purpose. And the premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended.”⁸⁶

The purchaser of a lot from an owner, who has made and exhibited a plat of a subdivision, showing streets and alleys, acquires a right not only to the use of the streets and alleys, but that such streets and alleys shall remain open for the use of the public. The sale and conveyance according to the plat imply a grant or covenant to the purchasers of the lots and their grantees that the public streets included

85—Burns v. Curran, 275 Ill. 448.

86—Sec. 3, Ch. 109, R. S.

in the plat shall forever remain open as public highways, free from all claim of the proprietor, or those claiming under him, inconsistent with their use as public highways. In such case the acceptance by the public is unimportant, for the question involved is one simply of private right. The easement which is appurtenant to each lot by reason of the existence of the plat, and the sale with reference to it, is private property. It cannot be lost merely by non-usure when there is no adverse possession. But a complete non-usure of an easement for a period of twenty years, with possession in another that is inconsistent with or adverse to the right of such easement, will bar the easement.⁸⁷

Where a deed refers to a plat or subdivision, the particulars shown on the plat or subdivision are as much a part of the deed as though they were recited in the deed.⁸⁸

Upon the survey of a platted tract, if a deficiency or a surplus is discovered, the same should be divided pro rata among the several lot owners.⁸⁹

A plat made by the county clerk for purposes of taxation as provided by the Revenue Act, is void and a cloud upon the title of the owner when not certified as required by the statute in that regard, or when the names, width, course and extent of the streets thereon are not set forth as provided by the statute in regard to Plats.⁹⁰

In cases where the fee in the street is in the municipality it has the right to require persons occupying a portion of the street beneath the surface thereof to pay rent therefor.⁹¹

Where the owners of several tracts of land join in a plat of the subdivision thereof into blocks, lots, streets and alleys, and the owner of one of the tracts fails to comply

87—*Swedish Ev. Lu. Church v. Jackson*, 229 Ill. 506.

88—*Schneider v. Sulzer*, 212 Ill. 87; *Henderson v. Hatterman*, 146 Ill. 555; *Smith v. Young*, 160 Ill. 163; *Simpson v. Mikkelsen*, 196 Ill. 575.

89—*Francois v. Maloney*, 56 Ill. 299.

90—*Ely v. Brown*, 183 Ill. 575.

91—*Tacoma S. D. Co. v. Chicago*, 247 Ill. 192.

with the statute in regard to the subdivision and platting of property, this fact destroys the validity of such a plat as a statutory subdivision. The plat is an entirety, and it cannot be partly statutory, and partly not statutory.⁹²

§ 1464. Dedication of Lands to the Public—A public highway, or alley, may be established in three ways:

(1) By condemnation in the mode prescribed by the statute;

(2) By grant, which may be established by producing the deed making the grant, or by long continued user for twenty years or more, implying a previous grant;

(3) By dedication, either expressed or implied, to the public use by the owner of the soil.

Where it does not appear that either of these methods have been adopted it cannot be held that the public have acquired any right or interest in the alleged highway.

In order to establish a dedication at common law, it is essential (1) that an intention on the part of the proprietor of the land to donate the same to the public use, and (2) an acceptance thereof by the public to be established by the evidence, and (3) that the proof as to these facts must be clear, satisfactory and unequivocal. The vital and controlling principle in a common law dedication is the *animus donandi*, and where there is no manifestation on the part of the proprietor of the soil, either by formal dedication, or by such acts as would equitably estop him from denying such intention, to donate land to the use of the public, it cannot be said there is a valid dedication. The mere non-assertion of a right does not establish a dedication of lands to the public. A dedication is not the act of omission to assert a right, but it is the affirmative act of the donor, resulting from an active, and not a passive, condition of the owner.

The making of a plat by a public officer for the purpose of

⁹²—Goodwilly Co. v. Commonwealth
Electric Co., 241 Ill. 42.

taxation, which shows a strip of land which is to be regarded as an alley is not binding on the owner. He does not represent the public and could not by any act of his create a highway. And the fact that the property has been assessed according to the plat is immaterial as to the rights of the owner or as indication of acceptance thereof by the public.⁹³

The case of the Union Coal Co. v. City of LaSalle, 136 Ill. 119, is an interesting case in regard to the platting and dedication of lands to the public for public use.

It appeared that the territory within the city of LaSalle was originally platted by the Canal Trustees, the holders of the legal title, in accordance with the provisions of the statute, so as to vest, under the statute, the title in fee simple in the city; that the coal company, without any title or authority, mined coal under the streets of the city, and the city had sued the company in trespass therefor. The proper question submitted to the court was one of law, whether the court properly found the defendant guilty on the facts established. In this regard the court says: "By our statute the acknowledgment and recording of a plat by the owner of lands within the city, by which such lands are subdivided into blocks, lots, streets, alleys, public squares, etc., is declared to operate, both at law and in equity, to a conveyance in fee by the owner of the city of such portions of the lands platted as are embraced in the streets, alleys and other grounds dedicated to the use of the public, and it is provided that the lands embraced in such streets, alleys and other public places shall be held by the city in its corporate name in trust for the uses and purposes set forth and intended by the plat.

It results from this provision of the statute, that the legal title to the streets and alleys in question in this suit is vested in the city of LaSalle, in trust for the use of the public for the purposes of streets and alleys.

93—Chicago v. Borden, 190 Ill. 430.

The trust thus vested in the city is not a mere naked trust, but one in the execution of which the city has and holds the possession, control, management and supervision of the trust property. It is the duty of the trustee to defend and protect the title to the trust estate and as the legal title is in him he alone can sue and be sued in a court at law. That the entry of the defendant upon the strata of coal underlying the streets of LaSalle and mining coal therefrom was a trespass cannot admit of a doubt."⁹⁴

From this decision it is to be gathered that where a plat and subdivision of land is made and recorded in pursuance with the statute in that regard the fee of the streets and public grounds which passes thereby to the municipality is a fee simple absolute, for all purposes, and the common law in regard thereto, that the ownership of the surface of the ground includes therein the ownership from the center of the earth to the heavens above, prevails completely and absolutely, although the conveyance may be for a particular purpose, or upon a particular trust.

§ 1465. Heir or Devisee Liable for Debts of Ancestor—Statute—"When any lands, tenements or hereditaments, or any rents or profits out of the same, shall descend to any heir, or be devised to any devisee, and the personal estate of the ancestor of such heir or deviser of such devisee shall be insufficient to discharge the just demands against such ancestor, or deviser's estate, such heir or devisee shall be liable to the creditor of their ancestor or deviser to the full amount of the lands, tenements or hereditaments, or rents and profits out of the same, as may descend or be devised to said heir or devisee; and in all cases where any heir or devisee shall be liable to pay the debts of his executor or deviser, in regard to any lands, tenements or hereditaments, or any rents or profits arising out of the same, descending or being devised to him, and shall sell, alien or make over

⁹⁴—Union Coal Co. v. LaSalle, 136 Ill. 119.

the same before any action brought, or process sued out against him, such heir at law or devisee shall be answerable for such debt to the value of the said lands, tenements and hereditaments, rents or profits so by him aliened or made over; and executions may be taken out on any judgment so obtained against such heir or devisee, to the value of said lands, tenements and hereditaments, rents and profits, out of the same, as if the same were his own proper debts, saving and excepting that the lands and tenements, rents and profits, by him bona fide aliened, before action brought, shall not be liable to such execution.”⁹⁵

§ 1466. Liability of Heir or Devisee at Common Law—At common law a devisee was not liable for the debts of the testator even in respect to the land devised. Nor was an heir liable for the debts of his ancestor, in respect to lands descended, except in particular cases; such as debts due on specialties, in which the ancestor expressly bound the heir, and on judgments recovered against the ancestor and recognizances acknowledged by him. And where the heir alienated the lands before suit brought, the creditor was without remedy against him.

But under our statute the devisee has no just claim to the land until the debts of the testator are fully paid. Nor has the heir any superior rights to the lands of the ancestor. They both acquire the land subject to the payment of the debts of the former owner. They are only entitled to the surplus that remains after the debts are discharged. If the creditor cannot obtain satisfaction of his debt from the personalty he may resort to the real estate in the hands of the heirs or devisees, and in case of a bona fide alienation of the same, suit may be brought and he may charge them personally with its value.⁹⁶

§ 1467. Statutory Liability of Heir or Devisee, a Cumulative Remedy—In the case of *Crocker v. Smith*, 10 Ill. App.

⁹⁵—Sec. 12, Ch. 59 (Frauds & Perjuries) R. S.

⁹⁶—*Ryan v. Jones*, 15 Ill. 1.

376, it was contended that the plaintiff had not brought himself within the provisions of the Statute on Frauds and Perjuries, and that the statute worked a repeal of the common law. To which the court replies: "We do not so understand the law. The remedies against heirs and devisees furnished by the statute, are cumulative in their character, and afford not only a means for the collection of many debts and demands against deceased persons, for the collection of which no provision existed prior thereto. but also additional means for the collection of such debts as were already at common law a charge upon the heir. The purpose of the statute was not to change the common law remedy then existing for specialty creditors, when the ancestor had expressly bound the heir, but to give additional remedies, not only to them, but to all creditors of the deceased."⁹⁷

This is usually done, however, by a proceeding by the administrator or executor against the heirs and others for an order to sell the lands of the deceased to pay his debts, on it being ascertained that the personal property is insufficient to do so.

The statute provides that all demands against the estate of a deceased person not exhibited in the county court within two (now one) years from the granting of letters of administration shall be forever barred, except as to subsequently discovered assets, not inventoried or accounted for by the executor or administrator. But the heirs and devisees of a deceased person are liable to the amount of property received by them from the estate of the deceased where the cause of action against the deceased did not fully arise until after the closing of the estate.⁹⁸

But a creditor cannot maintain an action against heirs, on the debt of a deceased ancestor, without also joining the personal representative of the deceased as a co-defendant, except in two cases, first, where a judgment has already

⁹⁷—*Crocker v. Smith*, 10 Ill. App. 376.

⁹⁸—*Dugger v. Oglesby*, 99 Ill. 405.

been rendered against the personal representative, and there are no assets in his hands for its payment; and, second, where the estate has not been administered within one year from the death of the ancestor.¹

§ 1468. **Pleadings Against Heir**—In pleading the liability of the heir it is not necessary to aver in the declaration that the heir has assets by descent, but it devolves upon him to plead *riens per discent*.²

§ 1469. **Knowledge of Contents of Instrument—Blind and Illiteral Persons**—Every deed by which anything shall pass from one to another, where the party executing it has no understanding but by hearing only, ought to be read to him; so one who is not lettered is reputed in law as one who cannot see, but hear only, and all his understanding is by hearing, and so a man who is lettered and cannot see, is taken in law as a man not lettered, and, therefore, if a man is blind and the deed is read to him in any other manner than correctly, he may avoid the deed, because all his understanding in such case is by his hearing.³

Where it appears that the grantor could write, the presumption is that he could read writing, especially where there is nothing in the evidence to show that he could not. He is deemed in law to know the contents of his deed.⁴

§ 1470. **Construction of Conveyances**—The courts are very liberal in construing deeds so as to give them effect if possible, and, although intended to come within one class, if they cannot be made to operate in that form on account of some defect, they are often found capable, and permitted to accomplish the object of the parties, by a construction that brings them within some other class of deeds known to the law.⁵

While obscure and indefinite language used in a deed or

1—Hoffman v. Wilding, 85 Ill. 453.

4—Kennedy v. Kennery, 194 Ill.

2—Crocker v. Smith, 10 Ill. App.

346.

376.

5—2 Wash. on Real Prop. 607.

3—Rockford, R. I. & St. L. R. R.
Co. v. Shunick, 65 Ill. 223.

contract may be explained by oral testimony showing the surrounding circumstances of the parties, so that it may be construed from the standpoint occupied by the parties, yet it can never be construed so as to contradict, change or vary the language used.⁶

It is well settled that a written contract, unambiguous in its terms, cannot be varied, contradicted or modified by parol evidence of anything that occurred at or prior to the time when such written contract was executed. It is conclusively presumed that the whole agreement of the parties is included in the writing. Nor can a sealed executory contract be altered, changed or modified by parol agreement.⁷

The law presumes, in the absence of proof to the contrary, that a deed is what it purports to be, an absolute conveyance; and the burden of proof is upon the party claiming such an absolute deed to be a mortgage, to sustain his claim by evidence sufficient to overcome the presumption of law. To show that a deed absolute on its face is a mortgage, the evidence must be clear and satisfactory, and convincing. In order to constitute a mortgage there must be an ownership of the land by the party making the claim. And also that a debt existed between the mortgagor and the alleged mortgagee.⁸

A construction which requires the court to reject an entire clause in a deed is not to be admitted, except from unavoidable necessity.⁹

Where it is claimed that in drawing up the deed under which the complainants claim title that the word "heirs" was used by mistake for the word "children," such a mistake presents no case for the reformation of the deed, because such a mistake is one of law.

But in construing a deed made to the grantee and "her

6—Seymour v. Bowles, 172 Ill. 521.

8—Gannon v. Moles, 209 Ill. 180.

7—Schneider v. Sulzer, 212 Ill. 87;

9—Riggin v. Love, 72 Ill. 553.

Tulluride Power Co. v. Crane Co.,
208 Ill. 218; Alschuler v. Schiff, 164
Ill. 298.

minor heirs," the word heirs will be construed to mean "children" where it appears on the face of the deed that the ancestor is living, and thereby excludes the idea that the word "heirs" was used in its technical sense.¹⁰

A deed made in pursuance with a recorded bond therefor relates back to the date of the bond and conveys the title as it stood at the time of the record of the bond.¹¹

§ 1471. Intention of Parties to Be Ascertained and to Control—The legitimate purpose of all construction of a contract or other instrument in writing, is, to ascertain the intention of the party or parties making the same, and when this is determined, effect will be given thereto, unless to do so would violate some established rule of property. The nature and quantity of an interest granted by a deed are always to be ascertained by the deed itself, and are to be determined by the court as a matter of law. The intention of the parties will control the court in construction of the deed, but it is the intention apparent and manifested by the deed construing each clause, word and term involved in construction according to its legal import, and giving to each thus construed its legal effect. It is not to be presumed that parties use words or terms in the conveyance without intending some meaning should be given to them, or without an intent that the effect legitimately resulting from their use should follow; hence, if it can be done consistently with the rules of law, that construction will be adopted which will give effect to the instrument, and to each word and term employed, rejecting none as meaningless or repugnant.¹²

In construing a deed or conveyance the intention of the grantor is to be looked to, and it must be found in the deed, and in doing so well known rules of interpretation are applied.¹³

When used as words of limitation, the words "heirs of

10—*Seymour v. Bowles*, 172 Ill. 521.

12—*Lehndorf v. Cope*, 122 Ill. 317.

11—*Snapp v. Pierce*, 24 Ill. 156.

13—*Chapin v. Nott*, 203 Ill. 341.

the body" indicate all those persons who, upon the death of the immediate ancestor, succeed to the estate from generation to generation. If the words are so limited as not to include the whole line of inheritable succession, but only to designate the individuals who are, upon the death of the ancestor, to succeed to the estate and who are themselves to constitute the source of future descent, they are words of purchase. And when it is manifest that the words "heirs of the body" are words of purchase they will be so held. Especially if they are limited by the words, "their heirs and assigns." So limited they do not indicate descendants of the life tenant who are to take in succession, from generation to generation, but only the individuals who may be his heirs at his decease, and who themselves become the ancestors from whom the succession is to be derived and from whom an estate of fee simple will descend.¹⁴

Where a will gives an estate to one during her life, "and to the heirs of her body begotten, after her death," the gift is to the class named in the devise. And where the life estate is at an end, the "heirs of her body," living at the death of the testator, take their devise, not as the heirs of the life tenant generally, but by virtue of the original gift to them as a class, to be ascertained when the will took effect. That is on the death of the testator.¹⁵

The grant in a deed was to "John E. Leinweber and Elizabeth Leinweber for and during the natural life of the former only, and for and during the widowhood of the latter as a widow of said John E. Leinweber only, in case she survive him, with remainder over to the children and their descendants of the said John E. Leinweber upon the decease of both of said grantees as well as upon the decease of John E. Leinweber and the remarriage of said Elizabeth Leinweber." It was considered by the court that

14—*Aetna L. I. Co. v. Hoppin*, 249 Ill. 406.

15—*Lancaster v. Lancaster*, 187 Ill. 540.

the words "and their descendants" were words of purchase, and being words of purchase it was possible for the descendants of the children to take concurrently with their parents or in substitution of deceased parents. Unless the instrument creating the estate indicates a contrary intention, the weight of authority seems to be that in a grant to several and their descendants, the descendants would take by way of substitution, only, and not in competition with their parents living at the time of distribution. As the children were to take in substitution the remainders vested in the children of John E. Leinweber in being at the time the deed was made, subject to reduction on the birth of another child, and further subject to defeasance by death, during the lifetime of John E. Leinweber, of any remainderman leaving descendants, in which case the descendants would take their deceased ancestor's share.¹⁶

§ 1472. Ambiguous Instruments Construed Most Strongly Against the Grantor—Where a deed is so drawn that some will read it one way and some another, it is a well established rule that that meaning shall be adopted which is adverse to the interest of the grantor.¹⁷

§ 1473. Punctuation Not Regarded in Construing Instruments—It is one of the rules in construing deeds, that no regard is to be paid to punctuation; so, the omission of a comma, or a semi-colon after what apparently is regarded as the first call, is of no moment.¹⁸

§ 1474. Presumption Where Father and Son Have the Same Name—It will undoubtedly be presumed that the name mentioned in the conveyance is that of the father, instead of the son, where the father and son have the same name, and where such a conveyance is made, leaving it uncertain on the face of the deed whether the grant is to the

16—Pohlman v. Leinweber, 288 Ill. 58.

18—Vinson v. Vinson, 4 Ill. App. 138.

17—Alton v. Illinois Trans. Co., 12 Ill. 38; Vinson v. Vinson, 4 Ill. App. 138.

father or to the son, the law will presume that the father was intended as the grantee, in the absence of proof to the contrary. But such presumption may be overcome by proof.¹⁹

Where there is nothing on the face of the deed to show that the grantor and the grantee are father and son, except that their surnames are alike, such relation will not be presumed to exist, as against innocent third parties, for the purpose of defeating such deed.²⁰

§ 1475. Rights of Grantee Limited to Estate Granted—

Where the privilege of mining coal under a certain described piece of land is granted by a deed, after the coal has been removed the grantee has no further rights under the deed. A clause in a deed conferring the privilege of mining coal can mean nothing more nor less than the right is conferred to enter into the tract named and remove the coal, but when the coal is removed, the right conferred will cease to exist.²¹

§ 1476. Latitude Allowed in Construction of Wills—More latitude is given to the construction of wills than to deeds, and there is the highest authority for saying, to effect the clear intention of the testator, the words "heirs," "issue," "children," may be used interchangeably.²²

§ 1477. Conveyances Testamentary in Character—A deed which attempts to make a testamentary disposition of property, that is, which is not to take effect until after the death of the grantor, without complying with provisions of the Statute of Wills, is void.²³

A deed or other instrument in writing cannot pass title to property as a will, unless it is signed and witnessed as required by the statute of wills.²⁴

The law is well settled that if the intended disposition

19—Doty v. Doty, 159 Ill. 46.

20—Weber v. Chicago & W. I. R. Co., 246 Ill. 464.

21—Sholl v. German Coal Co., 139 Ill. 21.

22—Butler v. Huestis, 68 Ill. 594.

23—Wilson v. Wilson, 158 Ill. 567.

24—Kelly v. Parker, 181 Ill. 49.

of the property is of a testamentary character, and not to take effect in the grantor's lifetime, but is ambulatory till his death, such disposition is not operative unless it be declared in writing, in strict conformity with the statutory enactments regarding the making of wills.²⁵

Where it clearly appears that the grantor did not understand that he had surrendered dominion over the property to the grantee so long as the grantor should live, and that the deed was only made so that the grantee should carry out the wishes of the grantor, and he subsequently sought to change the beneficiaries of his bounty, then the court will view the disposition of the property as testamentary in character.²⁶

So where a deed purports to convey to the grantee the land described "from and after the death of the grantor" amounts to a testamentary disposition of the property, unless delivery is actually made and the act of delivery accompanied with such words or act as clearly manifested an intention that the deed become at once operative and effectual to pass title to the land.²⁷

Where deeds are made with the understanding that if the grantor dies first they were to be recorded, but if the grantee died first they were to be destroyed, it was held that the transaction was testamentary in character, and the deeds were not so delivered as to pass the title to the premises therein described.²⁸

A testamentary disposition of property is ambulatory until the death of the testator, when it takes effect.²⁹

§ 1478. Conveyances Not Testamentary in Character—It is only where the deed is not delivered by the grantor in his lifetime that it can be said to be testamentary in its character, and the fact that a life estate is reserved by the grantor, or, without such reservation, that he is permitted to

25—Benner v. Bailey, 234 Ill. 79.

28—Elliott v. Murray, 225 Ill. 107;

26—Oswald v. Caldwell, 225 Ill. 224.

Russell v. Mitchell, 223 Ill. 438.

27—Noffs v. Noffs, 290 Ill. 36.

29—Blackman v. Preston, 123 Ill. 381.

retain possession and control of the premises and receive the rents, issues and profits during his lifetime, even though the deed is found in his possession after his death, cannot render the instrument testamentary in character.³⁰

If the deed purports to convey the present estate, a verbal agreement by which the grantor retains possession, with a right to the rents and profits, does not make the deed testamentary, for the reason that it is not subject to revocation as in case of a will.³¹

Since the act abolishing the livery of seizin, the question as to whether or not a deed or conveyance reserving to the grantor a life estate and giving and granting to the grantee an estate in fee is a testamentary devise has been frequently presented. The rule is well established, a conveyance of real estate delivered, but not to take effect or be recorded until the death of the grantor, is good and valid without the creation of an intermediate estate to support it, and such an instrument cannot be held to be one in the nature of a testamentary devise, or disposition of property.³²

A deed containing granting words *in presenti*, and purporting to convey the premises mentioned therein at the time the instrument is executed, is not testamentary in its character because of reservations therein and trusts and conditions in respect to the use of the property during the life of the grantor.³³

A clause in a deed which expressly recognizes the title to be in the grantees, with a restriction on their right to convey or incumber during the lifetime of the grantor without his consent, was held not to be testamentary in character.³⁴

A testator executed his will in 1893, by which he dis-

30—Spencer v. Razor, 251 Ill. 278;

Potter v. Barrenger, 236 Ill. 224;

Harshberger v. Carroll, 163 Ill. 636;

Aekman v. Potter, 239 Ill. 578.

31—Craig v. Rupecke, 274 Ill. 626.

32—Latimer v. Latimer, 174 Ill.

418.

33—Kelly v. Parker, 181 Ill. 49.

34—White v. Willard, 232 Ill. 464.

posed of his entire estate. In 1902, he executed a deed to his sister for the expressed consideration of \$11,500, which contained this clause: "The grantor reserving, however, a life interest in and to the above described tract of land. And it is agreed and understood by and between the parties hereto, that the consideration in this deed mentioned is to be deducted from the grantee's share of the grantor's estate, be said share more, otherwise, if less, according to the will of said grantor." It was urged against the deed that if it were otherwise valid, the conveyance was a testamentary document, and void, for the reason, that the execution of the deed amounted to an attempted revocation of the residuary clause of the will so far as the real estate described in the deed was concerned, and that such revocation could not be accomplished by a deed. In answer to this the court says that if the deed was otherwise valid, it conveyed an immediate interest in an estate in lands to the grantee. By it she would then acquire a vested remainder in fee, subject to the life estate of the grantor. The removal of the real estate, which it conveyed, from the operation of the will of the deceased, and the method provided for the payment of the consideration, or the satisfaction of the liability of the grantee for the consideration, did not alter the situation. The instrument was not testamentary in its character.³⁵

A grantor made a deed by which he conveyed and warranted to the grantee certain lands, but which contained this reservation: "The grantor reserves to himself and his wife the use and occupation of said lands as their homestead for and during their natural lives and during the life of the survivor of them, and also all the rents, issues and profits thereof during their natural lives and during the life of the survivor of them. It being expressly understood and agreed by the parties hereto that the said grantee, who is the grandson of the grantors, shall live with

35—Seaton v. Lee, 221 Ill. 282.

them as a son, aid and assist, care for in sickness and old age, as a son should, the said grantors, and at the death of the survivor of said grantors the title and interest in said lands shall vest absolute in said grantee, but not before."

It was contended that this deed was void because it was testamentary in its character, and was not attested by two witnesses as required by the statute of wills. In this regard it is said the reservation by the grantor out of the estate granted a life estate for himself and his wife, and the survivor of them, showed that he understood, that but for the reservation the title at the delivery of the deed would fully vest in the grantee, both the right of possession and the legal title; and so long as the reservation was not as broad as the grant, it is plain that the grantor must have understood that notwithstanding the reservation, there was an interest in the property upon which the granting clause could operate. As to the provision that "at the death of the survivor of said grantors the title and interest shall vest absolute in said grantee, and not before," it is obvious that the grantor did not regard this as testamentary. Had he so regarded it there would have been no reason for the language in the earlier part of the deed reserving the life estate. Two things at least the grantor clearly perceived in making and delivering this instrument to his grandson: First, the interest which he kept for himself and wife; and second, the interest which he intended for the grantee in the deed, and the same instrument was used to fix these interests. In the judgment of the court the instrument was a deed.³⁶

In a voluntary deed of settlement made by the grantor and his wife to their sons, the following reservation was inserted: "But the grantors herein hereby expressly reserve the use and absolute control of said premises for and

³⁶—*Venters v. Wickens*, 224 Ill. 569.

during the period of their natural lives, and the title of said grantees as joint tenants, in equal parts, in said land shall become absolute only on the death of said Charles H. Willard and Ruth A. Willard, or the survivor of either of them." It was contended that the deed was testamentary in character, and, therefore, void because not executed in conformity with the statute of wills.

The court says: "While it is not necessary to determine whether the estate to the grantees is a vested remainder in fee, or contingent upon the grantees surviving their parents, we are inclined to the opinion that a fair construction of the clause would give the grantees a vested estate in remainder. There can be no doubt about this view were it not for the survivorship clause in regard to the grantees. The use of the word "absolute" in reference to the title that the grantees are to have, seems to imply that the grantees were to take a title presently, but that such title should not be perfect, but would become so on the death of the grantors. The thing that was to be united with the title of the grantees on the death of the grantors, and by which it would "become absolute," was, the "use and absolute control of said premises," which was expressly reserved to the grantors during their natural lives.³⁷

Although a deed may in terms state that it is made in lieu of a will, yet such a statement would not, of itself, render the deed void as a testamentary instrument. Such a statement has never been held to render an otherwise valid instrument void as a testamentary disposition of property. Where the instrument contains all of the requisites to constitute a valid conveyance of real estate under our statute,—a grantor and grantee, coupled with a valid consideration and apt words of conveyance, and is duly executed, acknowledged and delivered as required by law, this is sufficient.³⁸

37—White v. Willard, 232 Ill. 464.

38—Young v. Payne, 283 Ill. 649.

A deed executed by a grantor and delivered to a third person with instructions to deliver it to the grantee on the death of the grantor, the provision fixing the time when the grantee was to come into the actual enjoyment and possession of the land did not make the deed testamentary in character. The deed operates as a present conveyance of a remainder after the death of the grantor and required no intermediate estate to support the remainder.³⁹

§ 1479. Power of Revocation in Deed—A grantor made a deed of trust conveying certain property to a trustee to be held and managed by him for the benefit of the children of the grantor. The instrument gave no right of control to the grantor of any of the property conveyed or even the right to direct the management or enjoyment of the estate, but it contained a power of revocation in the grantor. This character of a deed, with such a power of revocation, has long been recognized by our law as a proper mode of an ancestor deeding his property to his children and in protecting them in the use and enjoyment of the same. All well skilled and far seeing attorneys advising for the benefit of their clients usually suggest the insertion of such a clause of revocation and no court has ever declared that such a deed is testamentary in character or is to be held to take effect only after death, by reason, alone, of such a clause of revocation. In fact it is not possible for such a clause to have such effect. As a matter of fact, such a deed takes effect at once and continues in full force and effect until actually revoked. If revoked, it can only be revoked during the lifetime of the grantor and if he does not call into effect such power of revocation during his lifetime it continues in full force and effect forever after his death. If he revokes the deed under such power of revocation the deed becomes a nullity, and the title will be reinvested in the grantor by a deed of reconveyance by the trustee.

39—Bullard v. Suedmeier, 291 Ill.

The latter clause of this sentence in the opinion was doubtless added because the deed of trust contained the expression, "and in case of such revocation said trust estate, or the portion thereof so revoked, shall be conveyed by the trustee to the settler to be held by him as his sole and absolute property and discharged of the trust declared in said trust agreement."⁴⁰

§ 1480. Titles Affected by Estoppel—Introduction—Titles are frequently affected by the law of estoppel, and it is proper that they should be considered here. But it cannot be expected that, in a work of this kind, anything more than a cursory view should be taken of them. The law in regard to them is applicable both at law and in equity, although the rules in regard to them may be different in one case than they are in the other. Or, more properly speaking, the rules appertaining to them which may apply in equity have no application in some cases at law.

§ 1481. Estoppel Defined—An estoppel may generally be defined to be the preclusion of a person from asserting or calling in question a fact which by his previous acts, allegations or denials, on his part, or on the part of those under whom he claims, or by a proper adjudication upon his rights, the contrary of which has been alleged, denied or adjudicated.

§ 1482. Equitable Estoppels—Pomeroy in his *Equitable Jurisprudence*, draws a distinction between legal and equitable estoppels and gives the definition of equitable estoppels: Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity, from asserting rights which might otherwise have existed, either of property, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some cor-

⁴⁰—*People v. Northern Trust Co.*,
289 Ill. 475.

responding right, either of property, of conduct, or of remedy.⁴¹

§ 1483. Origin of Equitable Estoppel—In considering the origin of equitable estoppel the learned author says:

“Equitable estoppel, in the modern sense, arises from conduct of the party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is equity and good conscience. Its object is to prevent unconscionable and unequitable assertion or enforcement of claims or rights which might have existed or been enforced by other rules of law, unless prevented by the estoppel, and its practical effect is, from motives of equity and fair dealings to create and vest opposite rights in the party who obtains the benefit of the estoppel. The doctrine of equitable estoppel is pre-eminently a creature of equity. It has, however, been incorporated into the law, and is constantly employed by courts of law at the present day in the decision of legal controversies. Preserving its original character, and depending upon equitable principles, it is administered in the same manner, and in conformity with the same rules, by courts both of law and equity.”⁴²

The doctrine of equitable estoppel proceeds on the theory that a party is forbidden to set up his legal title, because he has so conducted himself in regard to the property that to do it would be contrary to equity and good conscience.

When the foundation of the estoppel insisted upon is silence, and an omission to give notice of one's rights, the rule is, the party relying on the same must not have had the means of ascertaining the true state of the title by reference to the public records. They are supposed to show the true state of the title.⁴³

If a parol agreement, even though it be without considera-

41—2 Pomeroy's Equity, Sec. 804.

43—Thor v. Oleson, 125 Ill. 365.

42—2 Pomeroy's Equity, Sec. 802.

tion, has been executed, and, by means thereof, one of the parties has been led into a line of conduct which would be prejudicial to his interest if the parol agreement were not enforced, an equitable estoppel will arise in his favor. So where one of the parties to an agreement under seal, by parol, waives his right thereunder and accepts other considerations therefor, he will be estopped from demanding a performance of the sealed agreement.⁴⁴

If the party in possession of land is aware that a third party claims to own the land and has exhibited evidence of title thereto to the purchaser, and stands silently by and sees the purchaser buy it, under the impression that he is getting a good title to the land, the court will not allow him to set up a claim he had thus fraudulently concealed. Then it might be said that he kept silent when equity required him to speak, and not having spoken when he ought to have spoken, equity will command him to keep silent.⁴⁵

Where there was no fraudulent purpose in the party acting, and no change in the position or conduct of the other party in consequence thereof the doctrine of estoppel does not apply. The doctrine of estoppel *in pais*, or equitable estoppel, is based upon a fraudulent purpose and a fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel, there must be deception and a change of conduct in consequence, in order to estop a party from showing the truth.⁴⁶

It is not permissible, in an action in ejectment, to invoke estoppel *in pais* in order to defeat the legal title to land. Estoppel *in pais* is only available in equity. It is a principle recognized in equity only.⁴⁷

A party who has parted with all his interest in real estate cannot defeat the title of his innocent grantee by making statements or admissions in disparagement of the

44—Worrell v. Forsythe, 141 Ill. 22.

47—Linnertz v. Dorway, 175 Ill.

45—Dyer v. Martin, 5 Ill. 146.

508; Wakefield v. Van Tassell, 202

46—Gillispie v. Gillispie, 159 Ill. Ill. 41.

title thereto after he has parted with all his interest in the land.⁴⁸

It is a familiar rule that the statements of a grantor, made after the execution of the deed, are inadmissible for the purpose of invalidating the deed. No parol declaration made by such grantor is admissible for that purpose.⁴⁹

A partner, declaring at the time the mortgage was made by his co-partner, that his co-partner was the owner of the property and that he had no interest in it, is estopped from claiming the property as partnership property, and a judgment creditor, having notice thereof, is bound by such estoppel.⁵⁰

It is not necessary to the application of the doctrine of equitable estoppel, that there should be a fraudulent intent on the part of the party making the statement or representation. It is enough if there would be a fraudulent effect from the evidence attempted to be set up. The doctrine of equitable estoppel arises and is applied when that which would perpetuate a gross fraud and injustice is sought to be brought forward.

The rule in regard to equitable estoppel applies where the land owner has been active and encouraged and induced the other party to act to his disadvantage.⁵¹

§ 1484. Estoppels in Their Nature of Three Kinds—It is to be observed that estoppels are of three kinds in regard to their nature, viz.: They are (1) by matter of record; (2) by matter in writing (deed) and (3) by matter *in pais*.

Estoppels by matter of record are such as arise from the adjudication of a competent court. Judgments of courts of record and decrees and other final determinations of ecclesiastical, marine, and military courts work an estoppel.

Estoppel by deed are such as arise from the provisions of a deed. It is a general rule that a party to a deed is

48—Holton v. Dunker, 198 Ill. 407.

51—Hill v. Blackwelder, 113 Ill.

49—Shea v. Murphy, 164 Ill. 614. 283.

50—Cross v. Weare Com. Co., 153 Ill. 499.

estopped from denying anything stated therein, which has operated upon the other party, as the inducement to accept and act under the deed. To constitute an estoppel, the deed must be good and valid in its form and execution. It is said that an estoppel of this kind must convey no title which the warranty of title can operate in case of covenant, they affect only the parties and privies in blood, law or estate, and they must be reciprocal.

The doctrine of estoppel as applied to the administration of justice is that one may have what, according to the understanding of the parties, he bought and paid for.⁵²

In relation to the title to land, an estoppel by deed arises where there is in the deed an express or implied representation that the grantor, at the time of his conveyance, was possessed of the title which his deed purports to convey. If there is such a representation, and it is false, whether he has committed a fraud, or is acting under an honest belief, he is estopped from denying that he has title; he could not, by setting it up, defeat his own grant. It is unimportant to notice the difference of opinion in the books, as to whether the covenants operate to convey or transfer the after acquired title or whether the title remains in the grantor by estopping him from asserting title contrary to his deed. Nor whether it is important that section 7, chapter 30, of the revised statutes is declaratory of the common law, or changes the same in any respect. This statute applies only to deeds which purport to convey an estate in fee.

A conveyance warranty deed by one not having title is made as valid to pass an after acquired title as if the grantor had the legal title at the time of the conveyance.⁵³

Where a party conveys land by a deed with full covenants of warranty, and before action is brought on the covenant, the owner of the outstanding title conveys it to

52—Bennett v. Waller, 23 Ill. 97;
Holbrook v. Debo, 99 Ill. 372.

53—Guertin v. Mombleau, 144 Ill.
32; Hill v. Blackwelder, 113 Ill. 283.

the grantor, the effect of the latter conveyance is to vest, by virtue of the statute and by way of estoppel, the legal title in such grantee.⁵⁴

§ 1485. **Estoppels in Pais** are such as arise from the acts and declarations of a person by which he induces another to alter his position, injuriously to himself. This principle has been applied to cases of dedication of lands to a public use, and where the owner stands by and sees land improved and sold without making known his claim.⁵⁵

§ 1486. **Estoppel Applicable to Municipalities**—While the statutes of limitation may not be invoked against a municipality in regard to the public property, yet the doctrine of equitable estoppel is sometimes applied to them. But in order to estop the city authorities from reclaiming a portion of a street which has been enclosed by an abutting owner with his lot, it must appear not only that the city authorities have ceased, for a long time, to exercise control over such portion, and that by reason thereof the owner has been induced to believe the strip to have been abandoned, and he has erected expensive structures and improvements thereon.

§ 1487. **Liens on Lands**—It might not be out of place here also to slightly refer to the general subject of liens on lands. The law provides, in a number of cases, for liens on lands, such as judgments, mechanics, indebtedness, vendors and others. But these are so vast and important that many able volumes on each of them have been written, and it would not be in harmony with the intention of this work to refer to them other than in a cursory manner.

§ 1488. **Judgment Liens**—Under the statute a judgment of a court of record is a lien on the real estate of the person against whom it is obtained situated within the county for which the court rendering the judgment is held, from the

54—Wadhams v. Swan, 109 Ill. 47;
Lewis v. Pleasants, 143 Ill. 271; Owen
v. Brookport, 208 Ill. 35.

55—Douvier's Dic. 541.

time the same is rendered or revived for the period of seven years and no longer. And upon the filing in the office of the clerk of any court of record in any county in this state, of a transcript of a judgment or decree rendered in any other county of this state, such judgment shall have the like force and effect, and shall be a lien upon the real estate of the party against whom the same may be obtained in said county where filed. But unless execution is issued on such judgments within one year from the time the same became a lien it shall thereafter cease to be a lien.⁵⁶

And when it shall appear by the return of an execution issued by a justice of the peace that the defendant has not personal property sufficient to satisfy the judgment and it is desired by the plaintiff to have satisfied out of real property it shall be lawful for the justice of the peace to certify to the clerk of the circuit court of the county a transcript of his judgment and thereupon the same shall have the same force and effect of a judgment of the circuit court.⁵⁷

All persons are required to take notice of the judgments of courts of record, and when dealing with property subject to the liens of such judgments they are bound thereby whether in fact they have such knowledge or not.⁵⁸

The rule is a familiar one, that judgments become liens on the real estate of the defendant in the order in which they are rendered.⁵⁹

§ 1489. Judgment on Constructive Notice—Where a defendant is brought into court by constructive notice, and has received no notice in writing of the existence of a decree against him, as authorized by the statute, such decree is, for the period of three years, simply provisional, and subject to be set aside on petition, and as of course.

56—Sec. 1, Ch. 77, R. S.

59—Hallorn v. Trum, 125 Ill. 247.

57—Sec. 1, Art. 12, Ch. 134, R. S.

58—Calif. v. Parsons, 48 Ill. App. 253.

In form, it is a final decree, but it does not become so in fact, and does not conclude the parties until the lapse of three years; from the time it thus becomes final, the defendant, having received no notice, has five years (now three years—Sec. 117, Ch. 110, R. S.) within which to prosecute his writ of error or file his bill of review. During the three years the parties are still in court, and at the end of that period the statute provides that the court may make such further order in the premises as may be just. "We are the more inclined to the view we have taken, because this statute by which the parties are brought into court upon constructive notice, though undoubtedly necessary for the administration of justice, may be made the means of perpetrating very great wrongs."⁶⁰

§ 1490. Liens of Creditor's Bills—Creditor's bills, with proper and distinct averments as to the property attempted to be reached, will become liens upon the filing of the bill and acquiring jurisdiction over the defendant. A junior creditor may obtain a prior lien by exhausting his remedy at law in first invoking the aid of a court of equity, by filing his bill and the due service of process.

The commencement of a suit in equity does not constitute *lis pendens* until summons or subpoena has been served or jurisdiction over the defendant otherwise obtained.

It must be shown, however, that the judgment debtor had some interest in the property conveyed by him, in order to sustain a creditor's bill to have such conveyance set aside as fraudulent as to creditors.⁶¹

§ 1491. Priority of Lien on Land of Debtor Fraudulently Conveyed—In a contest between creditors of a common debtor who had fraudulently conveyed his property with the intent of defrauding them, it appeared that one party had secured a judgment and levied an execution on prop-

⁶⁰—*Lyon v. Robbins*, 46 Ill. 276.

⁶¹—*Hallorn v. Trum*, 125 Ill. 247;

Clark v. Wilson, 127 Ill. 449.

erty so fraudulently conveyed; and another creditor subsequently secured a judgment, had execution returned no property found and then filed a bill to set aside such fraudulent conveyance; afterwards the first judgment creditor filed his bill for the same purpose; on a contest as to who was first entitled to have his claim satisfied out of the proceeds of a sale of the property, it was claimed by the first creditor that he was so entitled because his was the first judgment, and by virtue of this levy on the property; but it was held that, as the land was situated in the same county in which the judgment was recovered, the judgment itself was not a lien on the property because of its conveyance by the debtor prior to the recovery of the judgment, and the levy was not a lien because it was not so provided by the statute. But as the second judgment creditor was the first to file his bill he acquired a first lien in equity on such proceeds; that by filing his bill and procuring jurisdiction of the defendant he thereby first obtained *lis pendens*, which operated as an equitable lien upon the land, and the equitable liens followed in their proper order.⁶²

§ 1492. Lands Subject to Judgment Lien—A judgment in the circuit court is a lien upon the interest of the defendant in lands at the time of the rendition of the judgment held by him under a certificate of entry and purchase from the United States, and such lien is not affected by a subsequent assignment of the certificate by the defendant and the issuing of a patent by the government to the assignee.

A title derived from the government is to be adjudged by the same rules as one derived from an individual owner of the fee, and when the government is made an instrument of fraud in granting titles, courts will interfere to protect the injured party as readily as in cases of fraud between individuals.⁶³

⁶²—Union National Bank v. Lane, 177 Ill. 171.

⁶³—Rogers v. Brent, 10 Ill. (5 Gilm.) 573.

And the liens of a judgment upon equitable interest is not affected by the fact that the instrument by which it is created is not recorded.⁶⁴

The interest of a vendor in lands contracted to be sold by him is such an interest as may be levied upon and sold on execution: the purchaser, however, will be required to carry out the contract of the vendee.⁶⁵

§ 1493. Remedy of Creditor Where Debtor Has Fraudulently Conveyed Land Prior to Judgment—Where the judgment debtor has no title of any kind, it would seem that the creditor cannot acquire title by a levy and sale under execution against such debtor. Whether this rule applies to cases of fraudulent conveyances there is a variety of opinion. In some of the authorities it has been held that when a debtor procures a conveyance to be made in secret trust, the remedy is in equity, and not by levy and sale on execution. When, however, the legal title has been in the debtor so as to be subject to an execution at law, and could be made available for the satisfaction of the judgment but for the fraudulent conveyance, the creditor, or a third person having taken title under a sheriff's deed, may bring ejectment and avoid the conveyance of the debtor by proof of the fraudulent purpose for which it was made. The judgment creditor has the right where the deed is made fraudulently by the judgment debtor to sell land under execution, notwithstanding they may have been fraudulently conveyed by the judgment debtor.

In such case the creditor may treat the debtor as the owner of the property and pursue his proper remedy at law as if the title were unembarrassed by the pretended deed.⁶⁶

Where a debtor, for the purpose of defrauding his creditors, conveys his property prior to the rendition of a judg-

64—*Barlow v. Cooper*, 109 Ill. App. 375.

66—*Willard v. Masterson*, 160 Ill. 443.

65—*McLaurie v. Barnes*, 72 Ill. 73.

ment, such a judgment is not a lien upon the real estate so conveyed, for the reason that, as between the parties to the conveyance, it is binding till set aside, and no interest, legal or equitable, remains in the grantor upon which a lien can rest.⁶⁷

It is also true that a judgment creditor may treat land fraudulently conveyed by his debtor as the property of the debtor, and may levy upon it, and then bring a bill to remove the fraudulent conveyance. The plaintiff or judgment creditors should also proceed to make his levy effective by advertisement and sale.⁶⁸

§ 1494. Purchaser at Judicial Sale Not Entitled to Possession till Deed Is Delivered—A decree of a court which directs possession to be given before a deed is made is erroneous. Such a decree is conceived to be in contravention of the provisions of the statute allowing redemption from sales. No case can be found where a party has been put into possession who was a purchaser at a judicial sale, before a deed has been executed to him by the officer selling. Until the purchaser obtains his deed, he is, for the most purposes, a stranger to the possession, and if, after he obtains his deed, possession is refused him, he must resort to his action of forcible detainer under the statute, or seek some other appropriate remedy.⁶⁹

§ 1495. Vendor's Liens—The doctrine of a vendor's lien is derived from the civil law, and was first applied in the case of *Chapman v. Tanner*, 1 Vern. Ch. 267, decided in 1684. At first it was strongly opposed, but is now firmly established both in England and the United States.

But the lien of the seller exists only between the parties to the transaction, and those having notice that the purchase money has not been paid.⁷⁰

67—*Rappelye v. International Bank*, 93 Ill. 395; *Hallorn v. Trum*, 125 Ill. 247; *Union Nat. Bank v. Lane*, 177 Ill. 171.

68—*Union National Bank v. Lane*, 177 Ill. 171.

69—*Bennett v. Matson*, 41 Ill. 332.

70—*Bouvier's Dic.* "Purchase Money."

A vendor's lien upon real estate is a creature of courts of equity, and upon the equitable consideration that where the vendor has not taken security for the purchase money, and done no act showing an intention to waive the lien, it is presumed that it was not the intention of the parties that one should part with and the other acquire the title without the payment of purchase price of the land. It exists, if at all, independent of any contract, is personal to the vendor, and whenever, from the circumstances, the court can infer that he did not rely upon the lien at the time of the sale, or subsequently abandoned it as security, it will be held to be waived.⁷¹

It is a general rule in equity, and it requires a very strong case to make an exception, that no man shall be compelled to part with his title until he receives the consideration; and so vigilant are courts of equity to protect the seller, that though an absolute conveyance be made, and no mortgage or other security taken, still the land being in the hands of the vendee, or subsequent purchaser with notice, the vendor has a lien on the land for his money.⁷²

The vendor's lien created by implication in favor of the vendor is personal to himself, and is not assignable or transferable even by express contract between the vendor and the assignee. It can be enforced only by the vendor himself. This is an established rule in equity. Such liens are secret, and often productive of gross injustice to others dealing in respect to the property to which they attach, and courts of equity will not extend them beyond the requirements of settled principles of equity.⁷³

The principle is now too well settled to require discussion, that where the vendor parts with the legal estate and takes security, other than the personal liability of the grantee for the payment of the purchase money, he thereby waives his lien on the land. The taking of the obligation

71—*Lehndorf v. Cope*, 122 Ill. 317;
Wright v. Buchanan, 287 Ill. 468.

72—*Dyer v. Martin*, 5 Ill. 146.

73—*Lehndorf v. Cope*, 122 Ill. 317.

of the purchaser, secured by a third person, amounts to an extinguishment of any implied lien on the land. In such case, the seller is considered as relying on the security taken, and not on the land, for the payment of the consideration.⁷⁴

It is a well recognized equitable right, which exists between vendor and vendee, and all persons purchasing with notice thereof, whether it be expressed in the deed or not. The only advantage that can be had by making mention thereof in the deed of the reservation of the lien, is to give notice thereof by record, so as to prevent its being cut off by a conveyance by the vendee to an innocent purchaser without notice. By such a reservation no estate is reserved in the land to the grantor, nor does the non-payment of the purchase money work a forfeiture of the estate granted. It only amounts to a lien for so much money, which a court of equity will enforce by rendering a decree for the sale of the land so charged. So a decree which declares a forfeiture of the entire estate granted, by directing the master to execute a deed of conveyance to the lien holder, is erroneous. The decree should direct a sale of the premises subject to the right of redemption.⁷⁵

It properly arises where the owner of land conveys the same by deed, thus divesting himself of the legal title, and some part or all of the purchase money remains unpaid. In such case the grantor retains, in equity, a lien for the unpaid purchase money. It is sometimes said that a lien arises or grows out of an executory contract for the sale of lands, whether by an ordinary contract or a bond for a deed, whatever may be its form, and when a part or the whole of the purchase money remains unpaid. But there is a plain distinction between the lien of a grantor after he has made a conveyance, and the interest of a vendor under a

74—*Trustees of School v. Wright*,
11 Ill. 603; *Burger v. Potter*, 32 Ill.
66.

75—*Murphy v. Smith*, 5 Ill. App.
562.

contract of sale before conveyance. A vendor's lien is not a legal estate but is a more equitable charge upon the land. It is not even, in strictness, an equitable lien, until declared and established by a decree. Although possession may be delivered to the vendee under the contract, and although the vendee may have acquired an equitable estate, yet the vendor retains the legal title, and the vendee cannot prejudice that legal title, or do anything by which it can be defeated, except by performing his part of the contract. To call this complete legal title of the vendor a lien is certainly a misnomer.

In the case of a conveyance the grantor has a lien but no title; in case of a contract for sale before conveyance, the vendor has the title and has no need of a lien.⁷⁶

These secret vendor's liens on real estate become in point of fact, however it may be in legal contemplation, unknown to the parties affected by them, are often productive of great injustice, and ought not to be encouraged. Courts should not lend their aid to enforce them, as against third persons, except in clear cases, and where creditors have not been guilty of any laches in asserting them. If a vendor fails to institute proceedings to enforce an implied lien, within a reasonable time after his right has accrued, the presumption should be indulged that he relied exclusively on his other remedies to recover the purchase money, and therefore waived or abandoned his lien on the land. After a great lapse of time, third parties who have become interested in the land, have a right to conclude that the vendor was either satisfied with his other securities, or had actually received payment. They ought not, after such lapse of time, without any effort on the part of the vendor to charge the land with the payment of the purchase money to be molested or disturbed in the enjoyment of the property honestly acquired, and for which they paid full considera-

⁷⁶—Robinson v. Appleton, 124 Ill.

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2 R. P.—23

tion. There must be a time when they may repose with some degree of security upon their title. The most serious consequences would result to creditors and purchasers, if the vendor was permitted, after remaining passive for years, to set up and enforce his lien, which had its origin in a mere presumption of law; and not in virtue of any contract between the parties to the sale. The whole doctrine of implied liens is of very questionable policy.⁷⁷

The taking of security by a vendor is a waiver of the implied vendor's lien, and such security will be the sole measure of the vendor's rights in the land for the security of the payment of the purchase money.⁷⁸

In accordance with the principles of equity a vendor's lien, although it will continue to exist against the land until the minor comes of age, it should not be enforced by sale of the land until he comes of age, and thereafter refuses or neglects to fulfil his contract or re-convey the land. So where a bill was filed to enforce a vendor's lien during the minority of the purchaser it was held that the decree should provide that the vendor's lien should exist against the land until the consideration therefor was paid, and should also provide if the land is not re-conveyed or the consideration paid before or within a reasonable time after the minor became of age, then the court, on the filing of a supplemental bill and a hearing thereon, after due notice to all the parties, may enter an appropriate order or decree to enforce the lien by a sale of the land in question.⁸⁵

A court of equity, as a general principle, cannot review a lien that has once been waived or other security taken in lieu thereof.⁷⁹

§ 1496. Alteration of Deeds—There have been many different expressions in different jurisdictions concerning the presumption of law in cases where the instrument or deed

77—*Trustees of Schools v. Wright*, 11 Ill. 603.

78—*Ryhiner v. Frank*, 105 Ill. 326.

85—*Wright v. Buchanan*, 287 Ill. 468.

79—*Burger v. Potter*, 32 Ill. 66.

appears to be altered, in the absence of proof on that subject. The question has been considered by the Supreme Court of Illinois, and the rule has been adopted which learned authorities say is best supported by reason and to which the authorities seem to be tending. It is that the mere fact of an interlineation or an erasure appearing in an instrument does not, of itself, raise any presumption of law either for or against the validity of a writing, but that the question when, by whom and with what intent it was made is one of fact to be submitted to the jury. The law upon the subject is that if any ground of suspicion is apparent upon the face of the instrument the law presumes nothing, but leaves the question as a matter of fact to the jury. The courts refuse to adopt the presumption that the alteration was made contemporaneous with its execution, but leaves it to be explained by an inspection of the instrument, with other evidence, as a question of fact. Where an instrument appears on its face to have been altered, the party producing it is called upon to explain it, and if it is suspicious in appearance and satisfactory explanation is not made, the proper conclusion is a conviction of fact against the instrument.⁸⁰

The modern doctrine seems to be that it would not be competent for the court, upon the mere inspection of the instrument, to declare it void by reason of alterations or erasures appearing upon its face, nor for the jury to do so by mere inspection, but it is a matter of evidence in which the presumptions are against the party holding and offering the instrument in evidence, and he is to be called upon to explain them as being exceedingly suspicious, especially if the alterations are found to be favorable to him on the inspection of the whole instrument. To what extent the party offering the instrument in evidence is called upon to

80—Gillitt v. Sweat, 1 Gilm. 475; Walters v. Short, 5 Gilm. 252; Reed v. Kemp, 16 Ill. 445; Hodge v. Gilman, 20 Ill. 437; Pyle v. Oustatt, 92 Ill. 209; Montag v. Linn, 23 Ill. 503; 501 Catlin Coal Co. v. Lloyd, 180 Ill. 398.

do this will depend upon the circumstances of each case. There is no presumption of law, either that the alterations and interlineations apparent upon the face of the deed were made prior to its execution or subsequently. The question is to be settled by the jury upon all the evidence in the case.

All writers agree that the only safe way in making such alterations and erasures is by noting them upon the instrument itself, to show that they were made before delivery.⁸¹

But it is a well settled rule that an alteration, even in a material part, may be made in a deed or note, after its execution, if it is proved to have been done by the consent of all the parties to it, and they are competent to contract.⁸²

Where it appears from other portions of the deed that the land described therein is located in the State of Illinois, the change of the word "Vermont" to that of "Illinois" is not a material alteration of the deed and did not vitiate it.⁸³

But the erasure of the name of the grantee in a deed and the insertion of the name of another party, after it was delivered, without the knowledge or consent of the original grantee, would have no effect upon the validity of his title as between the parties. Where a deed is altered by the substitution of grantees, it cannot support a claim of the substituted grantee to the land conveyed by the deed.⁸⁴

§ 1497. Courts of Equity May Reform Conveyances and Correct Mistakes Therein—Courts of equity have power to reform deeds and correct mistakes therein in order that they may conform to the intent of the parties.⁸⁵

To justify the reformation of a written instrument upon

81—2 Wash. on Real Prop. 554.

82—Stiles v. Probst, 69 Ill. 382;

Abbott v. Abbott, 189 Ill. 488.

83—Sanitary District v. Allen, 178

Ill. 330.

84—Abbott v. Abbott, 189 Ill. 488.

85—Wiemer v. Himmel, 200 Ill. 374.

the ground of mistake, it is necessary, first, that the mistake should be one of fact and not of law; second, that the mistake should be proved by clear and convincing evidence; third, that the mistake should be mutual and common to both parties to the instrument.

The rule is inflexible that a mistake or misapprehension of the law is never relieved against or corrected. If a party designs to perform an act under a mistaken view of the law affecting the transaction he is held to the obligations incurred. As a matter of necessity, all persons are presumed to know the law, and the maxim is that ignorance of the law excuses no one. A mistake of law is an erroneous conclusion as to the legal effect of known facts. The construction of words is a matter of law. A mistake in regard to the legal effect of the language used and the legal consequences of retaining such language is a mistake of law.

In giving construction to deeds the courts are confined to the terms of the instrument itself, the object being to ascertain the intention of the grantor as expressed by the language used, and not the unexpressed purpose which may at the time have existed in his mind. Where there is no ambiguity in the terms used, or where the language used has a legal meaning, the instrument itself is the only criterion of the intention of the party.⁸⁷

However, the rule in regard to correcting deeds in equity has no application to deeds made by officers of the law in pursuance to legal proceedings.⁸⁸

But it is equally well settled that a mistake in a deed will not be corrected as against an innocent third party without notice or without notice of sufficient facts and circumstances sufficient to put him upon inquiry, which, if pursued with diligence would lead to notice of the mistake.⁸⁹

87—*Snyder v. Partridge*, 138 Ill. 173; *Goltra v. Sanasack*, 53 Ill. 456; *Purvines v. Harrison*, 151 Ill. 219.

88—*Ritchie v. Pease*, 114 Ill. 353.

89—*Barton v. Mayers*, 183 Ill. 360.

Where the grantor knew that the word used before he signed the deed, but insisted that he knew the legal effect of the word, and that it expressed his meaning, the deed cannot be reformed. A mistake in that regard is one of law and not of fact.⁹⁰

Equity has power to reform a deed which contains words limiting the estate conveyed, which were inserted without the knowledge of the parties thereto, and against their intention, by striking out of the deed such words.⁹¹

Equity may also reform a deed which contains a clause which is personal in character and not in the nature of a covenant running with the land and attaching to the title to the land, and contrary to the understanding of the parties thereto.⁹²

Where a party seeks to rectify a written instrument on the ground of mistake, the rule is the evidence must be such as to leave no fair or reasonable doubt upon the mind that the instrument does not embody the final intention of the parties. Rectification can only be had where both parties have executed an instrument under a common mistake, and have done what neither of them intended. A mistake on one side may be ground for rescinding, but not for correcting or rectifying, an agreement.⁹³

But where there has been a mutual mistake the writing may be rectified by a court of equity.⁹⁴

Where the vendor and the vendee employ the same person as their agent in negotiating the sale and purchase of land, both are estopped from denying the agency where the agent makes a mistake in preparing the deed. His mistake is the mutual mistake of both the vendor and the vendee.⁹⁵

A state court is not authorized to review the decrees,

90—Atherton v. Roche, 192 Ill. 252.

93—Sutherland v. Sutherland, 69

91—Wiemer v. Himmel, 200 Ill. 374.

Ill. 481.

374.

94—Warrick v. Smith, 137 Ill. 504.

92—Ross v. Harben, 49 Ill. App.

95—Warrick v. Smith, 137 Ill. 504.

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judgments and orders of the United States Court. This proposition seems to be self evident, and but little need be said in support of it. And a mistake in a deed executed by an assignee in bankruptcy, and confirmed by the United States Court, cannot be reformed and corrected by a proceeding in a state court.⁹⁶

§ 1498. Equity Will Correct the Omission by Mistake of a Seal—Where through mistake or oversight in the execution of an agreement a seal necessary to its validity is omitted therefrom, but the instrument purports on its face, to be a sealed instrument, it will ordinarily itself furnish the evidence showing the oversight or mistake, and a court of chancery will correct it. And this will be done even in the case of a surety.⁹⁷

§ 1499. Power of Courts of Equity to Set Aside Conveyances—Where in case of accident, mistake or fraud either party to a conveyance has been imposed upon, or suffered an injury, a court of equity may set aside the conveyance and restore the parties to the same condition they were in before the execution of the conveyance. But the courts will never enforce mere technicalities, at the sacrifice of justice, unless compelled to do so by the stern and inflexible rules of the law. So after a mother has parted with her interest in lands and received the consideration thereof and enjoyed the same till her death, her children will not be permitted to set aside her conveyance after the lapse of many years, on a mere informality in her deed.⁹⁸

§ 1500. Party Asking Equity Must Do Equity—Where land has been bought of a person before he has been adjudged insane, in good faith, by the purchaser, or money has been loaned to such a person in good faith, and he secures the payment thereof by a mortgage, and the proceeds of the sale or mortgage are expended in and about his

96—*Ritchie v. Pease*, 114 Ill. 353.

98—*Nichols v. Padfield*, 77 Ill. 253.

97—*Henkleman v. Peterson*, 154 Ill.

419; *Gilreath v. Dilday*, 152 Ill. 207.

support, the deed or mortgage cannot be avoided until the money received by him is returned or offered to be returned.⁹⁹

Where it appears by the evidence that full or a fair value has been paid for the property conveyed, a deed will not be set aside because of the incapacity mentally of the grantor to transact business.¹

⁹⁹—Burnham v. Kidwell, 113 Ill. 425.

¹—Onstott v. Edel, 232 Ill. 201.

CHAPTER XV

ACKNOWLEDGMENTS, PROOF OF EXECUTION, RECORDING, NOTICE AND EVIDENCE OF CONVEYANCES

- § 1510. Introduction.
- § 1511. Nature of Acknowledgments—Whether Judicial or Ministerial.
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- § 1652. Power of State to Convey—Statute.
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§ 1510. Introduction—In this chapter will be considered the remaining sections of the chapter of the statutes on "Conveyances" and such portions of other statutes as relate to the same subject.

It will include the statutes and decisions of the courts on the subjects acknowledgments, proof of the execution of instruments, recording of documents, notice both actual and constructive, evidence furnished by conveyances and other documents, and other matters relating to these subjects. It has been extremely difficult to arrange them in a consecutive manner and doubts are entertained as to the success in this regard.

§ 1511. Nature of Acknowledgment, Whether Judicial or Ministerial—The question has arisen whether the taking of an acknowledgment is a judicial or a ministerial act, and in considering this question it has been said that an official action is judicial when it is the result of judgment or discretion. When the officer has the right to hear and determine the rights of persons or property, or the propriety of doing an act, he is vested with judicial power. An officer will be regarded as clothed with judicial power, or quasi-judicial functions, when the powers so confined to him are so discretionary that he can exercise or withhold them according to his own judgment as to what is necessary or proper.

But where the duty imposed upon an officer is absolute, certain and imperative, involving merely the performance of a set task, and when the law which imposes it, prescribes the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion, it is ministerial. Official action is ministerial when it is the result of performing a certain and specified duty, arising from fixed and designated facts. The same officer may be charged with the performance of both judicial and ministerial duties, and when he is in the exercise of his ministerial duties only, he is, of course, not protected by his judicial privilege.

Decisions may be found sustaining the position that the taking an acknowledgment is a judicial act. It must be confessed that there is no little conflict among the authori-

ties upon this subject. But doubtless this conflict has proceeded mainly from the failure to distinguish between cases of acknowledgments of married women and other cases where married women were not concerned.

By the law in force in the State of Illinois prior to the passage of the present Conveyance Act in 1872, the officer, taking the acknowledgment of a married woman, joining with her husband in the execution of a deed, was required to make the contents known to her, and to examine her separate and apart from her husband as to whether she executed the same, and relinquished her dower, voluntarily and without compulsion. In such case the officer necessarily acted judicially, because he was obliged to draw his own conclusions from an examination conducted by himself, as to the voluntary or involuntary character of the act of the wife, and to base his official conduct upon the conclusions so drawn. The common law required that the acknowledgment of a wife should be made in open court by fine or recovery, and it always became a matter of record. In the levy of a fine and the privy examination constituted part of a judicial proceeding, and never could be contradicted. The present examination before an officer taking the acknowledgment, and his certificate to the fact of such examination and acknowledgment, were made substitutes for the fine, and given the same effect by the statute. By authorizing an officer to take such acknowledgments and privy examination, the legislature conferred upon them duties of the same nature as those theretofore exercised by the courts, and hence gave their acts the dignity of judicial proceedings.

But the present statute of Illinois no longer requires the separate examination of a married woman in order to relinquish her dower or convey her separate property. She is treated as though she were a *femme sole*.¹

§ 1512. Acknowledgment of Instruments—Officers to Take Within the State—Statute—“Deeds, mortgages, con-

1—*People v. Bartels*, 138 Ill. 322.

veyances, releases, power of attorney or other writings of or relating to the sale, conveyance or other disposition of real estate, or any interest therein, whereby the rights of any person may be affected in law or in equity, may be acknowledged or proved before any one of the following courts or officers, namely:

“First—When acknowledged or proved within this state, before a master in chancery, notary public, United States commissioner, county clerk, justice of the peace, or any court of record having a seal, or any judge, justice, clerk or deputy clerk of any such court. When taken before a notary public or United States commissioner, the same shall be attested by his official seal; when taken before a court or clerk thereof, or a deputy clerk thereof, the same shall be attested by the seal of such court; and when taken before a justice of the peace, there shall be added the certificate of the county clerk under the seal of office, that the person taking such acknowledgment or proof was a justice of the peace in said county at the time of taking the same. If the justice of the peace resides in the county where the lands mentioned in the instrument are situated, no such certificate shall be required.”²

§ 1513. Designation of Officers to Take Acknowledgments

—The enumerated officers are empowered to take acknowledgments of deeds, not because the act of taking the acknowledgment is germane to any particular power inhering in the office they hold, but simply and only because the General Assembly has, in the exercise of its plenary legislative authority in that respect, arbitrarily designated them for that purpose.³

§ 1514. Acknowledgment of Deeds Without the State and Within the United States—Statute—“When acknowledged or proved without this State and within the United States or any of its territories or dependencies or the District of Columbia, before any justice of the peace, notary public,

²—Sec. 20, Ch. 30, R. S.

³—Gould v. Howe, 131 Ill. 490.

master in chancery, United States commissioner, commissioner to take acknowledgment of deed, mayor of a city, clerk of a county or before any judge, justice, clerk or deputy clerk of the supreme, circuit or district court of the United States, or before any judge, justice, clerk or deputy clerk, prothonotary, surrogate, or registrar of the supreme, circuit, superior, district, county, common pleas, probate, orphan's or surrogate's court of any of the states, territories or dependencies of the United States. In any dependency of the United States such acknowledgment or proof may also be taken or made before any commissioned officer in the military service of the United States. When such acknowledgment or proof is made before a notary public, United States commissioner, or commissioner of deeds, it shall be certified under his seal of office. If taken before a mayor of a city it shall be certified under the seal of the city; if before a clerk, deputy clerk, prothonotary, registrar or surrogate, then under the seal of his court; if before a justice of the peace or master in chancery there shall be added the certificate of the proper clerk under the seal of his office setting forth that the person before whom such proof or acknowledgment was made was a justice of the peace or master in chancery at the time of taking such acknowledgment or proof."⁴

§ 1515. Official Character of Officer Taking Acknowledgment—It is not necessary to prove the official character of the officer taking the acknowledgment of a conveyance, except where the statute so requires.⁵

§ 1516. Instruments Acknowledged in Sister States in Conformity with Laws of Illinois—Admission in Evidence—Where the land is situate in this state, an acknowledgment taken before a notary public in a sister state, and certified under his seal of office, in conformity with our law, is sufficient to admit the deed in evidence without further

⁴—Sec. 20, Ch. 30, R. S.

Gilm.) 160; Irving v. Brownell, 11

⁵—Vance v. Schuyler, 6 Ill. (I Ill. 416.

proof of its execution. Proof of the authority of a notary public to take acknowledgments in a sister state is not required under our conveyance act. If it is acknowledged in conformity with our statute that is sufficient.⁶

§ 1517. Certificate of Acknowledgment to Conform to the Laws of Either One or the Other State—Laws of Both Cannot Be United—Where a party relies upon the laws of another state in regard to the acknowledgment of a deed, a compliance, in all essential particulars, must be shown with that law. If he relies upon the law of this state, a like compliance with such laws must be shown. The laws of both states cannot be invoked in aid of an acknowledgment manifestly defective when tested by the laws of either state.⁷

The territorial laws of Indiana of 1807 prescribed no particular form of acknowledgment, and did not require the certificate to contain a clause that the grantor was personally known to the officer taking the acknowledgment.⁸

Where in the transcript of a record the word “(Seal)” appears it will be presumed that the original would show an official seal where the law requires an official seal. It will not be presumed that it was a private seal.⁹

§ 1518. Execution of Instrument in Conformity with Laws of Other States—Certificate of Conformity—Statute—“An acknowledgment or proof of execution of any instrument aforesaid, may be made in conformity with the laws of any state, territory, dependency, or district where it is made; provided, that if any clerk of any court of record within such state, territory, dependency, or district shall under his hand and the seal of such court, certify that such acknowledgment or proof was made in conformity with the laws of such state, territory, dependency or district, or it shall so appear by the laws of such state, territory, dependency or district, such instrument or a duly

6—*Dawson v. Hayden*, 67 Ill. 52;
Glos v. Garrity, 190 Ill. 545; *Ramsey v. People*, 197 Ill. 572.

7—*Adams v. Bishop*, 19 Ill. 395.

8—*Russell v. Whiteside*, 5 Ill. 7.

9—*Moore v. Titman*, 33 Ill. 357.

proved or certified copy of the record of such deed, mortgage or other instrument relating to real estate heretofore or hereafter made and recorded in the proper county may be read in evidence as in other cases of such certified copies." ¹⁰

§ 1519. Time of Making the Certificate of Conformity Immaterial—Where the clerk of a court of record of another State certified under the seal of his court, that the acknowledgment of a deed contained in a certified copy of such deed, was, when it was taken to the original deed, in accordance with the laws of the state where executed, and that the person who took the acknowledgment was a justice of the peace of such state, such certificate of conformity will be sufficient, although it was made many years after the execution of the deed and the making of the certificate of acknowledgment. ¹¹

§ 1520. Seal of Office Essential to Certificate of Conformity—Where the certified copy of the record of a deed is offered in evidence, and it appears to have been acknowledged before a justice of the peace in a sister state, but the certificate of conformity does not appear to be under the seal of the proper officer, it will not be admitted in evidence. The court will not presume that the seal was affixed to the certificate and omitted by the recorder. The presumption is that the recorder performed his duty, and transcribed the deed upon the record precisely as it was presented. ¹²

The seal of the officer taking the acknowledgment to a deed may appear anywhere in the certificate of acknowledgment. ¹³

It is not sufficient that a scroll be used, instead of a seal, although the clerk who makes the certificate states that a

10—Sec. 20, Ch. 30, R. S.

12—Buckmaster v. Job, 15 Ill. 328.

11—Dunlap v. Dougherty, 20 Ill.

13—Gilbreath v. Dilday, 152 Ill.

397.

207.

scroll is used instead of the seal of the court, because the same has been lost.¹⁴

§ 1521. Certificate of Conformity to Show that Officer Taking the Acknowledgment Was Such at the Time of Taking Same—Where an acknowledgment of a deed is taken in a sister state before a justice of the peace, there should be added the certificate of the proper clerk, under the seal of his office, setting forth that the person before whom such proof or acknowledgment was taken was a justice of the peace at the time of making the same. It is not sufficient for the clerk to certify that such justice was a justice of the peace at the time the clerk makes his certificate.¹⁵

§ 1522. Certificate of Conformity to Show that Officer Making Same Was an Officer of the State—In order for a certificate of conformity to be effective it must appear that the officer making the certificate was an officer of the state within which the acknowledgment was made, and that he was acting under and by the authority of such laws.¹⁶

§ 1523. Evidence that the Officer Making the Certificate of Conformity Was the Keeper of the Record Unnecessary—Where a certificate of conformity is in the exact requirements of our statute, it is not necessary that it should appear that the officer making the certificate was the keeper of the record of the officers, one of whom took the acknowledgment, and other proof of the due execution of the deed is unnecessary.¹⁷

§ 1524. Any Legal Mode of Proving Due Execution of Instrument Admissible—A deed executed, acknowledged or proved in another state, conveying lands in this state, may be shown to have been executed and acknowledged, or proved, in conformity with the laws of such other state, by any legal mode of proving that fact. So it may be shown that the deed was executed in conformity with the laws of such state by the statutes thereof.¹⁸

14—*Skinner v. Fulton*, 39 Ill. 484.

17—*Harding v. Curtis*, 45 Ill. 252.

15—*Phillips v. People*, 11 Ill. App.

18—*Eagan v. Connelly*, 107 Ill.

340.

458; *Eaker v. Hefferman*, 159 Ill. 38.

16—*Lyon v. Kain*, 36 Ill. 362.

§ 1525. Defects in Certificate of Acknowledgment Cured by Certificate of Conformity—Although the certificate of acknowledgment may be defective on account of the want of a proper venue, when it is made in a sister state, yet if the certificate of magistracy and conformity is full and complete in this regard the defect in the certificate of acknowledgment will be cured.¹⁹

§ 1526. Acknowledgments Taken Without the United States—Statute—“Third—When acknowledged or proven without the United States then before any court of any republic, dominion, state, kingdom, empire, colony, territory or dependency having a seal, or before any judge, justice or clerk thereof or before any mayor or chief officer of any city or town having a seal, or before any notary public or commissioner of deeds, or any ambassador, minister or secretary of legation or consul of the United States or vice consul, deputy consul, commercial agent or consular agent of the United States in any foreign republic, dominion, state, kingdom, empire, colony, territory or dependency attested by his official seal or before any officer authorized by the laws of the place where such acknowledgment or proof is made to take acknowledgments of conveyances of real estate or to administer oaths in proof of the execution of conveyances of real estate. Such acknowledgments to be attested by the official seal, if any, of such court or officer, and in case such acknowledgment or proof is taken or made before a court or officer having no official seal a certificate shall be added by some ambassador, minister, secretary of legation, consul, vice consul, deputy consul, commercial agent, consular agent of the United States residing in such republic, dominion, state, kingdom, empire, colony, territory or dependency, under his official seal, showing that such court or officer was duly elected, appointed or created and acting at the time of such acknowledgment or proof was made.”²⁰

19—Hardin v. Osburne, 60 Ill. 93.

20—Sec. 20, Ch. 30, R. S.

§ 1527. Retroactive Effect of Act—Statute—“Fourth—All deeds or other instruments or copies of the record thereof duly certified or proven which have been heretofore acknowledged or proven before either of the courts or officers in this act mentioned, and in the manner herein provided, shall be deemed to be good and effectual in law and the same may be read in evidence without further proof of their execution, with the same effect as if this act had been in force at the date of such acknowledgment or proof.”²¹

§ 1528. Acknowledgments Before Justice of the Peace in Another County—Statute—“All deeds, mortgages and other instruments in writing, relating to or affecting any lands, tenements or hereditaments situated within this state, which have been or may hereafter be executed and acknowledged or proved before any justice of the peace of any county in this state, other than the one in which the lands, tenements or hereditaments lie, and which have been or may be recorded in the county where such lands, tenements or hereditaments do actually lie, shall be adjudged and treated by all courts as legally executed and recorded, notwithstanding there is no certificate attached to said mortgage or other instrument, by the proper officer, that the justice of the peace before whom said deed, mortgage or other instrument was acknowledged or proved, was, at the time of said acknowledgment or proof, an acting justice of the peace of the county in which said deed, mortgage or other instrument purports to have been acknowledged or proved: *Provided*, that the record or a certified transcript of such record shall not be read in evidence, unless the certificate of the proper county clerk, under his official seal, is produced, or other competent evidence introduced, showing that the person purporting to take such acknowledgment was a justice of the peace at the date such acknowledgment was taken, and for this purpose the cer-

21—Sec. 20, Ch. 30, R. S.

tificate of the proper county clerk shall be prima facie evidence."²²

§ 1529. Any Instrument Relating to Real Estate May Be Acknowledged Before an Authorized Officer—Any officer mentioned in the statute may take the acknowledgment of any instrument relating to any interest in real estate.²³

§ 1530. Statute Mandatory as to Officers Authorized to Take Acknowledgments—The provision of the statute as to the officer before whom acknowledgments of conveyances may be had is mandatory, and among the officers mentioned is a mayor of a city, so when an acknowledgment is taken before the mayor of a town, not being in conformity with the statute, it may properly be rejected as evidence without other or further proof of its execution.²⁴

§ 1531. Execution of Instruments in Foreign Countries in Conformity with Its Laws—Statute—"Where any deed, conveyance or power of attorney has been or may be acknowledged or proved in any foreign state, kingdom, empire or country, the certificate of any consul or minister of the United States in said country, under his official seal, that the said deed, conveyance or power of attorney is executed in conformity with such foreign law, shall be deemed and taken as prima facie evidence thereof; *provided*, that any other legal mode of proving that the same is executed in conformity with such foreign law may be resorted to in any court in which the question of such execution or acknowledgment may arise."²⁵

§ 1532. Conveyances Acknowledged or Proved in Conformity with Laws of Foreign State—Statute—"All deeds, conveyance and powers of attorney, for the conveyance of lands lying in this state, which have been or may be acknowledged or proved and authenticated as aforesaid, or

22—Sec. 21, Ch. 30, R. S.

23—Bowman v. Wettig, 39 Ill. 416; Holbrook v. Nichol, 36 Ill. 161; People v. Bartels, 138 Ill. 322; Woodruff v. McHenry, 56 Ill. 218.

24—Dunby v. Chambers, 23 Ill. 312 (369).

25—Sec. 22, Ch. 30, R. S.

in conformity with the laws of any foreign state, kingdom, empire or country shall be deemed as good and valid in law as though acknowledged or proved in conformity with the laws of this state.”²⁶

§ 1533. Manner of Making Acknowledgment or Proof of Execution of Conveyances—Statute—“No judge or other officer shall take the acknowledgment of any person to any deed or instrument in writing, as aforesaid, unless the person offering to make such acknowledgment shall be personally known to him to be the real person who and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a creditable witness, and the judge or officer taking such acknowledgment shall in his certificate thereof, state that such person was personally known to him to be the person whose name is subscribed to such deed or writing, as having executed the same, or that he was proved to be such by a credible witness (naming him), and on taking proof of any deed or instrument of writing, by the testimony of any subscribing witness, the judge or officer shall ascertain that the person who offers to prove the same is a subscribing witness, either from his own knowledge, or from the testimony of a credible witness; and if it shall appear from the testimony of such subscribing witness that the person whose name appears subscribed to such deed or writing is the real person who executed the same, and the witness subscribed his name as such, in his presence and at his request, the judge or officer shall grant a certificate, stating that the person testifying as subscribing witness was personally known to him to be the person whose name appears subscribed to such deed, as a witness of the execution thereof, or that he was proved to be such by a credible witness (naming him), and stating the proof made by him; and when any grantor or person executing such deed or writing and the subscribing witnesses are deceased, or cannot be had, the judge

or officer, as aforesaid, may take proof of the handwriting of such deceased party and subscribing witness or witnesses (if any); and the examination of a competent and credible witness, who shall state on oath or affirmation that he personally knew the person whose handwriting he is called to prove, and well knew his signature (stating his means of knowledge) and that he believes the name of such person subscribed to such deed or writing, as party or witness (as the case may be) was thereto subscribed by such person; and when the handwriting of the grantor or the person executing such deed or writing, and of one subscribing witness (if there be any), shall have been proved, as aforesaid, or by proof of the signature of the grantor where there is no subscribing witness, the judge or officer shall grant a certificate thereof stating the proof aforesaid.”²⁷

§ 1534. Acknowledgment in Conformity with the Statute—The acknowledgment must comply with the requirements of the statute, otherwise it is not available. So an acknowledgment of a deed to real estate, executed in the United States, before a mayor of a *town*, is unauthorized by the statute, mayors of cities only being authorized to take and certify to such acknowledgments.²⁸

§ 1535. Certificate of Acknowledgment Not Amendable—An officer having once executed a certificate of acknowledgment, cannot thereafter amend and change the same.²⁹

§ 1536. Personal Knowledge of Officer of Subscribing Witness—A statement in the certificate of the officer taking the proof of the execution of a deed that the witness who proved the deed was a subscribing witness with whom the officer was personally acquainted, may be considered as amounting to a statement that the officer of his own knowledge knew the witness to be a subscribing witness to the deed.³⁰

27—Sec. 24, Ch. 30, R. S.

30—*Job v. Tibbitts*, 9 Ill. (4 Gilm.)

28—*Dundy v. Chambers*, 23 Ill. 369. 143.

29—*Merritt v. Yates*, 71 Ill. 636.

§ 1537. Personal Liability of Officer for False Certificate

—If an officer in his certificate of acknowledgment to a mortgage falsely certifies that the person who appears to have executed the same is personally known to him, and that he appeared before the officer in person and acknowledged the same to be his act and deed, when in fact he did not do so, and the mortgage was a forged instrument, and an innocent third person advances money on such forged mortgage, the officer will be liable on his official bond to such third person for any loss he may sustain by reason thereof.³¹

§ 1538. Conveyances Duly Acknowledged Admitted in Evidence Without Further Proof of Execution

—The statute provides for the acknowledgment of conveyances and other documents relating to real estate, before certain officers, and when so acknowledged they shall be deemed to be good and sufficient in law, and the same may be read in evidence, without further proof of their execution.³²

§ 1539. Form of Proof by Subscribing Witness—A certificate of the proof of the execution of a deed by a subscribing witness was as follows, in substance :

State of New York, }
King's County }

Be it remembered that on the 25th day of August, in the year of our Lord eighteen hundred and thirty-eight, personally appeared before me Frederick Taylor to me known who being by me duly sworn did depose and say that he resides in the City of Philadelphia, and that the within named individuals, that is to say (naming the grantors) known to him to be the same persons whose signatures are annexed to the within instrument severally and respectively signed their names to said instrument, and duly acknowledged the execution thereof, for the uses and pur-

31—*People v. Bartels*, 138 Ill. 322.

32—Sec. 20, Ch. 30, R. S.

poses therein expressed, and that he became a subscribing witness to said execution.

In testimony whereof, etc.

(SEAL) (Signed) John Smalley, Notary Public.

It was held that this certificate was wholly defective. It contained no statement of the identity of the person testifying as to the execution of the deed with him whose name is thereto subscribed as a witness, either upon the knowledge of the officer taking the proof, or the testimony of a credible witness. Nor is the statement of the person testifying as to the execution of the deed, the proof of a credible witness required by the statute, that such person is a subscribing witness to the deed.³³

Another form of certificate of proof of the execution of a deed was substantially as follows:

State of Illinois |
Adams County. } ss.

Be it remembered that on the 21st day of October, A. D. 1846, came before me, John Tillson, Jr., to me personally known, and who by me sworn, did depose and say that he was personally acquainted with (here was stated the names of several grantors) whose names appear subscribed to the foregoing deed as grantors and attesting witness. That neither of said individuals now reside, or ever have resided in the State of Illinois, but that all of whom as deponent verily believes, who are not dead, except Frederick Taylor, whose residence, if in the United States, is unknown to his acquaintances, now reside in the State of Massachusetts, Connecticut, New York, or Pennsylvania. That said deponent well knew their signatures. That all of said named individuals, except Frederick Taylor, were trustees of the Illinois Land Company, of which the deponent was the agent, and said Taylor the secretary; and in connection with the transactions of said company, said deponent had fre-

³³—Job v. Tibbitts, 9 Ill. (4 Gilm.)

quently seen and well knew the signatures of said individuals, that said deponent verily believed each and all of the names of said individuals were thereto subscribed by themselves.

In testimony whereof, etc.

Peter Lott, Clerk

By George W. Leech, Deputy.

(SEAL)

It was objected to said certificate, first, that the officer taking the proof of the handwriting of the grantors named in the deed under consideration, did not in his certificate state that the person by whom such proof was made, was a credible and competent witness; and, second, that his means of knowledge of the handwriting of the persons named as grantors in and as subscribing witness to said deed, as stated in said certificate, were wholly insufficient to entitle him to prove by the statement of his belief that the names of such persons subscribed to said deed as grantors and witness were thereto subscribed by such persons.

To these objections the court replied: Although the law authorizes the officer to take the evidence of competent and credible witnesses only in proof of the execution of deeds, and to state the proof made by such witnesses, yet it does not require him to certify that such witnesses are credible and competent. The law in that respect is directory to the officer, and it will be presumed that he has obeyed its behests. That presumption, it is true, may be rebutted by proof that a witness proving a deed in any case, was not competent or credible, and the validity of the proof made by him be thus destroyed, but until then it will suffice.

The statement by the witness, that he as the agent of the Illinois Land Company, had frequently seen and well knew all the signatures of the grantors named in said deed as trustees, and of the subscribing witness as secretary of the same company, in connection with the transactions of said company is deemed sufficient to show, either that

he had seen such persons write, or had seen documents with their name subscribed thereto, and recognized by them as genuine, in the course of their business transactions.

In holding such a certificate to be sufficient the court was not to be understood as dispensing with the proof necessary to lay the foundation for receiving proof of a deed by any other than a subscribing witness thereto, when, as in this case, it appears that the deed was attested by a subscribing witness.

Such foundation can only be laid by satisfactory proof, in the language of the law, "that the grantor or the person executing such deed or writing, and the subscribing witness are deceased, or cannot be had"; and the requirements of the law in that behalf is not complied with, by a statement of the officer in his certificate of the proof made by the witness, that he swore to the death or absence of the grantor and subscribing witness. That proof is to be made to the court preliminary to the offering of the proof of the deed for its adjudication and must be made by matter aliunde the certificate. In the absence of anything showing that it was not so, it will be presumed that this requisite preliminary proof was made.³⁴

An officer before whom proof of a deed was made certified: This day personally appeared before me, Samuel L. McGill, a subscribing witness to the within deed (who was made known to me by the oath of Isaac Prickett, a credible witness), and who being by me duly sworn, etc. On the deed being offered in evidence, it was objected that it did not sufficiently appear that the person by whose testimony the proof was made was a subscribing witness, but it was held otherwise.³⁵

§ 1540. Acknowledgments by Married Women—As the law existed prior to 1872, the acknowledgment of a married woman was an essential part of the execution of the

34—*Job v. Tibbitts*, 9 Ill. (4 Gilm.) 143.

35—*Reece v. Allen*, 10 Ill. 236.

conveyance of her estate. The certificate of acknowledgment was required to state among other things that she was examined separate and apart from her husband, and that the contents of the deed was made known and explained to her. If it failed in this respect the deed was absolutely void as to her and her heirs.³⁶

The act of 1869 provided that "any feme covert, being above the age of eighteen years, joining with her husband in the execution of any deed, mortgage, conveyance, power of attorney, or other writing of or relating to the sale, conveyance or other disposition of lands or real estate, as aforesaid, shall be bound and concluded by the same in respect to her right, title, claim, interest or dower, in such estate, as if she were sole and of full age as aforesaid, and the acknowledgment or proof of such deed, mortgage, conveyance, power of attorney, or other writing, may be the same as if she were sole."

This act dispensed with many, if not all, of the formalities of acknowledgment required by the former statutes in respect to deeds of married women. But it was indispensable under this act that she should join with her husband in the execution of the deed, though it was not required that she should, in order to join with her husband in the execution of the deed, execute it at the same time. She might do it several years after it was executed by him.³⁷

§ 1541. Impeaching Certificate of Acknowledgment—In order to impeach an officer's certificate of acknowledgment for fraud, the evidence must be clear and convincing and beyond a reasonable doubt. Hence, the mere evidence of the party purporting to have made the acknowledgment that he did not do so, is not sufficient.

In the absence of proof of fraud or collusion on the part of the officer taking and certifying the acknowledgment of a deed, the officer's certificate of acknowledgment in proper

36—*Mettler v. Miller*, 129 Ill. 630.

37—*Stiles v. Probst*, 69 Ill. 382.

form must prevail over the unsupported testimony of the party grantor that the same was false or forged.³⁸

The evidence of the grantor, and the opinion of experts that the signature to the deed is not that of the grantor is not sufficient. All persons know that the grantor may sign a deed by the hands of another, and it becomes his signature by adoption; by the acknowledgment of it before a proper officer, the grantor thereby makes it his own.³⁹

Where the signature of the party to an instrument is corroborated by many strong circumstances, showing his recognition and admission of a contract about land, it will be deemed altogether sufficient and satisfactory.⁴⁰

Public policy requires that the acknowledgment should prevail over the unsupported testimony of an interested party, otherwise there would be but slight security to titles to real estate.⁴¹

The Supreme Court has often said, that the provisions of the law authorizing a justice of the peace, or other designated officer, to take the examinations of the parties to deeds was designed as a substitute for the proceedings at common law by fine and recovery, whereby the rights of the wife, on the one hand might be guarded, and a sure, indefeasible and unquestionable transfer of her rights secured on the other. It cannot be supposed whilst the legislature was protecting the wife they had no regard to the importance of inspiring confidence in the title. They knew well the ruinous consequences which would ensue from doubt and uncertainty as to title to land and nothing better to create such doubt could be conceived than the privilege, at any time, no matter how remote, of alleging and proving that the certificate of acknowledgment of the officer taking

38—Lickmon v. Harding, 65 Ill. 505; Fitzgerald v. Fitzgerald, 100 Ill. 385; Foster v. Latham, 21 Ill. App. 165.

39—Tunison v. Chamblin, 88 Ill. 376; Oliphant v. Liversidge, 142 Ill.

160; Kosturska v. Bartkiewicz, 241 Ill. 604.

40—Reed v. Kemp, 16 Ill. 445.

41—Watson v. Watson, 118 Ill. 56; Sassenberg v. Huseman, 182 Ill. 341; Baird v. Jackson, 98 Ill. 78.

the same was false. No man would be content with a title, in all respects perfect upon its face, when upon the death of his vendor, his widow, with the assistance of the officer, or without it, may undo what they have solemnly done, and without the possibility of contradiction. If such a practice were allowed, everything in relation to titles would be thrown into utter confusion, and irretrievable mischief would be the consequence.⁴²

Even the preponderance of the evidence less than sufficient to establish a moral certainty to establish the illegality of the certificate, is not sufficient.⁴³

Where there is an absence of the proof of fraud a certificate of acknowledgment cannot be impeached merely by negative facts appearing therein.⁴⁴

In taking acknowledgments of deeds, mortgages and other instruments affecting the title to real estate, an officer acts under the sanction of his official oath, and his certificate of official acts, required by law to be made, ought to be regarded as of as high a grade of evidence as testimony given under oath.⁴⁵

The fact that the notary who took the acknowledgment of a deed is not certain that the person in whose name it is executed is the same person who appeared before him to acknowledge the same, and that he thinks that the person who signed and acknowledged the same was a smaller person, is not sufficient to overcome the certificate of the officer made at the time of the acknowledgment.⁴⁶

The evidence of a notary public who took the acknowledgment of a married woman that he had no memory of asking her whether she released her homestead estate in the premises, and his impression is that he did not, is not sufficient to impeach the certificate, especially where she in

42—Kerr v. Russell, 69 Ill. 666.

45—Bardel v. Egan, 125 Ill. 298.

43—Griffin v. Griffin, 125 Ill. 430.

46—Sisters of Loretto v. Catholic

44—Stranch v. Hathaway, 101 Ill.

Bishop, 86 Ill. 171.

certain chancery proceedings admits the execution of the mortgage.⁴⁷

In order to impeach the certificate of acknowledgment of a conveyance, there must be some allegation of fraud or imposition between the parties interested and the officer taking the acknowledgment. Where the certificate is in the form required by the statute it is not sufficient to simply negative the facts stated in the certificate; something affirmative should be alleged and proved.⁴⁸

§ 1542. Evidence Sufficient to Overcome Certificate of Acknowledgment—The presumption arising from the certificate of acknowledgment of the notary is not to be overcome except by clear proof. In the absence of fraud and collusion on the part of the officer taking the acknowledgment, the officer's certificate in proper form must prevail over the unsupported testimony of the grantor that the same was false and forged.⁴⁹

Although the grantor's testimony, even when slightly supported, is not sufficient to establish the fact that the deed is a forgery, and is not sufficient to overcome the certificate of acknowledgment of the notary who purports to have taken the same, yet where the notary testifies that he does not know the grantor, and had never seen him: That while the seal and signature to the certificate of acknowledgment were genuine, he had no memory of having executed the same; that he had at one time prepared a certificate of acknowledgment in blank for the grantee on an instrument of some kind or nature.

Such evidence was held to be sufficient to overcome the validity of the notary's certificate.⁵⁰

An officer before whom an acknowledgment purports to have been taken is competent as a witness to impeach his

47—Minchrod v. Ullmann, 163 Ill. 25.

48—Graham v. Anderson, 42 Ill. 514; Hill v. Bacon, 43 Ill. 477.

49—McReynolds v. Stoats, 288 Ill.

22; Fitzgerald v. Fitzgerald, 100 Ill. 385.

50—Parlin & Orendorf Co. v. Hutson, 198 Ill. 389.

certificate, leaving the weight of the testimony to be determined by the trier. So he may testify that the party purporting to acknowledge the instrument did not in fact appear before him or acknowledge the execution of it.⁵¹

In the case of *Lewis v. McGrath*, 191 Ill. 401, it is said:

“During the time that intervened between the surgical operation and the death of Mary McGrath, and at the time it is claimed the deed was executed, the complainant, Mary T. McGrath, together with her cousin, Mary Kelley, and a Mrs. Coleman, attended upon the said Mary McGrath, with some assistance occasionally from some of the neighbors, but either the said Mary McGrath, the said Mary Kelley or Mrs. Coleman, was in the room with the said Mary McGrath all the time, as they all testified positively, and that neither C. C. Gilmore, the said notary public, before whom the said deed purported to be acknowledged, nor any one else, ever presented to Mary McGrath any deed or other paper for her signature or acknowledgment during that period, and that no such person as Gilmore ever entered her room during that time. This testimony is not contradicted, and two of the witnesses are disinterested parties. We think this evidence is sufficient to overcome the notary’s certificate.”⁵²

§ 1543. A Certificate of Acknowledgment Is Evidence Only of Such Matters of Which the Officer Is Required to Certify—and it may be shown that the grantor was mentally incapable of contracting at the time the acknowledgment was taken. The certificate of acknowledgment may, perhaps, be evidence that the officer considered the person whose acknowledgment was taken, of sufficient mental capacity to transact the business in hand, but it cannot be deemed evidence as to whether or not in fact the person did possess such mental capacity.⁵³

§ 1544. Ancient Deeds as Evidence—Deeds that are more than thirty years old are called ancient deeds, and they are

51—*McCurley v. Pitner*, 65 Ill. App. 17.

52—*Lewis v. McGrath*, 191 Ill. 401.

53—*Walker v. Shepard*, 210 Ill. 100.

admitted in evidence without proof of execution; but before this can be done, it must appear that the instrument comes from such custody as to show a reasonable presumption of its genuineness, and fact and circumstance must be shown which will establish the fact that the instrument has been in existence the length of time indicated by its date.

It is difficult to lay down a general rule as to the character of the proof necessary to be given; but where the deed comes from the proper custody, and facts and circumstances are proven to the court from which it may reasonably be inferred that the deed has had an existence for over thirty years, such ought to be sufficient, where it is entirely free from any just ground of suspicion. Indorsements or memoranda upon the deed or ancient paper have been considered as circumstances indicating that they are genuine when such indorsements or memoranda are of such a character as to show to a cautious and discriminating mind that they would not be there were the instrument a forgery.

In addition to this, if it be established that the deed has been on record for over thirty years, such ought to be a strong fact in its favor, although it may not have been recorded in the place required by law.⁵⁴

Where there is no proof of fraud or suspicious circumstances, and there is satisfactory proof of the existence of the deed for thirty years, this will entitle it to be read in evidence as an ancient deed.⁵⁵

A deed which is found where it ought to be, or the record of such a deed, or a certified copy of a record of such a deed, and which is thirty or more years old, proves itself. So where it appeared that the public records show that deeds existed for a period of forty years or more, and during that time transactions of great importance had been based upon them, both in conveyances and loans of money made on the property, if the deeds were forgeries, it is

54—Whitman v. Henneberry, 73 Ill. 109.

55—Quin v. Eggleston, 108 Ill. 248; Reuter v. Stuchart, 181 Ill. 529.

most improbable that in such case the fact would not have been discovered, and some title, hostile to the claim based on such deeds, have been asserted.⁵⁶

Some of the authorities differ as to the rule whether it be necessary to show that possession was taken under the deed. It seems to be settled, however, by the weight of authority, that such possession, if necessary, need not be for the full period of thirty years, but may be for a less period if there are circumstances tending to show the genuineness of the deed.⁵⁷

Although a deed and the record of it may be destroyed, yet if there be evidence admissible under the law that it was duly recorded, and had been a matter of record for a period long enough to make it an ancient deed, and there be no evidence of fraud or suspicious circumstances connected therewith, it will be regarded as an ancient deed and such evidence is admissible without proof of the execution of the deed.⁵⁸

§ 1545. Origin of Rule as to Ancient Deeds—The doctrine that no proof of the execution of a deed thirty years old is required, springs from the fact that originally, by the common law and by the statutes of most of the States, one or more witnesses were required to attest its execution, by which its execution should be proved. After the lapse of thirty years the presumption attains that the attesting witnesses were all dead.⁵⁹

§ 1546. Proof of Execution of Instruments When Witnesses Cannot Be Obtained—Statute—“If any grantor shall not have duly acknowledged the execution of any deed, or instrument entitled to be recorded, and the subscribing witness or witnesses be dead, or not to be had, it may be proved by the handwriting of the grantor, and at least one of the subscribing witnesses, which evidence shall consist

56—Bucklen v. Hasterlik, 155 Ill. 423.

57—Reuter v. Stuchart, 181 Ill. 529.

58—Stalford v. Goldring, 197 Ill. 156.

59—Fell v. Young, 63 Ill. 106.

of the testimony of two or more disinterested persons swearing to each signature."⁶⁰

§ 1547. Inability to Procure Subscribing Witness—Where the last information of a subscribing witness was had forty years before the proof of the handwriting to the deed, it may safely be inferred that after such a length of time, in which friends and neighbors had heard nothing of the witness, that he could not be had.⁶¹

§ 1548. Form of Certificate of Proof of Execution of Unacknowledged Deed—No form is given for the taking of proof of the execution of a deed, or other instrument affecting real estate, when the same is unacknowledged. It might be well, therefore, to give such a form as it is believed will comply with the terms of the law. In case the proof is made by a subscribing witness the following form may be useful:

State of..... }
County of..... } ss

Be It Remembered, that on this day personally appeared before me, (here state the name and office of the officer taking the proof), in and for said county (here give the name of the party making the proof), who is personally known to me to be the real person (or, if not so known state: who is proven to me by ———, a credible witness, who being first duly sworn on oath testified that he had known the said ———, subscribing witness, for ———, here state the length of time, or any other fact showing that the person identifying such subscribing witness could not be mistaken as to his identity, and identified him as such subscribing witness), whose name appears on the annexed instrument as a witness to the execution thereof, who being first duly sworn on oath says that he is the real person whose name appears on the annexed instrument as a witness to the execution thereof, and that (here state the name of the person who purports to have executed the same), whose name appears subscribed to said instru-

60—Sec. 25, Ch. 30, R. S.

61—*Skinner v. Fulton*, 39 Ill. 484.

ment as having executed the same was the real person who did in fact execute said instrument, and that the said (subscribing witness) subscribed his name thereto as such subscribing witness to the execution thereof in the presence and at the request of the said (the party purporting to execute the same).

In Witness Whereof I have hereunto subscribed my name and affixed my official seal this — day of —, A. D. —.

(Seal)

.....
Name of Office.

In case the subscribing witness cannot be produced by reason of death or otherwise, the form of the certificate of proof may be in the following form:

State of..... }
County of..... } ss

Be It Remembered, that on this day it being made to appear to me by the testimony of —, a credible witness, that (here insert the name of the subscribing witness), whose name appears on the annexed instrument of writing as a witness to the execution thereof (is dead, or cannot be produced, as the case may be), thereupon personally appeared before me (here state the name and official title of the officer taking the proof and making the certificate), in and for said county (here state the name of the witness), who is a competent and credible witness, and who being first duly sworn by me states that he personally knew (here give the name of the person whose name is to be proved, whether a subscribing witness or the person who executed the writing), and well knew his signature, he having seen the said (naming the party) write his name (or other facts showing his means of knowledge), and that he believes that the name of the said (naming the party) subscribed to the annexed instrument (“as a witness to the execution thereof,” or “as having executed the same”), was subscribed thereto by the said (naming the party), and the same is his genuine signature.

In Witness Whereof I have hereunto set my hand and affixed my official seal this — day of —, A. D. —.

(Seal)

.....
Name of Office.

These forms are in the singular number, but they may be modified so as to include two or more witnesses.

And in case there is no subscribing witness they may be modified so as to meet the requirements of the statute in that regard. These forms have passed the scrutiny of some of the best real estate lawyers in the city of Chicago.

§ 1549. Proof of Handwriting of Grantor Admissible on Inability to Produce Subscribing Witness—Although it may be the general rule that in the absence of the subscribing witness to a deed the next best evidence is proof of his handwriting, yet it is laid down as a principle that if nothing can be heard of the subscribing witness so that he cannot be produced and his handwriting cannot be proved then the execution of the deed may be shown by proving the handwriting of the grantor. If after proper diligence has been used to produce the subscribing witness or to prove his handwriting, and the same is unavailing, then evidence of the handwriting may be introduced; the party may resort to the same evidence as if there had been no subscribing witness.⁶²

A copy of a deed shown to be correct is competent evidence to prove the contents of the original deed, where, on proper search, the original deed cannot be found.⁶³

§ 1550. Form of Certificate of Acknowledgment—Statute—“A certificate of acknowledgment, substantially in the following form, shall be sufficient:

State of (name of State,)

County of (name of County.)

I (here give name of officer and his official title) do hereby

⁶²—*Newsom v. Luster*, 13 Ill. 176.

⁶³—*Gillespie v. Gillespie*, 159 Ill.

certify (name of grantor, and if acknowledged by wife, her name, and add "wife") personally known to me to be the same person whose name is (or are) subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he (she or they) signed, sealed and delivered the said instrument as his (her or their) free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and (private or official, as the case may be) seal this (day of the month) day of (month) A. D. (year).

Signature of officer (Seal)''⁶⁴

But see Sec. 1564 post.

§ 1551. Misnaming the Nature of Instrument Immaterial—The misnaming in the officer's certificate of acknowledgment of the document acknowledged, that is designating a deed a power of attorney, will not vitiate the acknowledgment.⁶⁵

§ 1552. Certificate of Acknowledgment to Contain Statements Required by Statute—The certificate of acknowledgment should contain the statement required by the statute. A statement that the officer is satisfied that the party acknowledging the document is the same party who signed the same is not sufficient. The statute provides for two modes of determining this fact; first, by a personal knowledge of the person, and second by proof made before him of a credible witness.⁶⁶

§ 1553. Substance of Statute in Certificate Only Necessary—Technicalities Disregarded—Prior to the act of 1872 the statute required that the certificate of acknowledgment in the case of a married woman in order to release her dower should contain a statement that she was examined separate and apart from her husband, and the contents of the deed fully made known and explained to her, and that she signed

⁶⁴—Sec. 26, Ch. 30, R. S.

⁶⁶—Shephard v. Carriel, 19 Ill. 313.

⁶⁵—Hurt v. McCartney, 18 Ill. 129.

the same freely and voluntarily, of her own accord and without fear or coercion of her husband, and that she relinquished her right and claim for dower in the land therein described and that she did not wish to retract the same, or words to such effect.

The object of such legislation seems to have been, in prescribing the mode by which a married woman might be divested of her interest in land, that she should not be imposed upon or coerced by her husband, and, to protect her from imposition and coercion, the officer should examine her separate and apart from her husband, that he should explain to her the nature of the act that she was about to consummate, and thus, by explaining to her the contents of the deed she had executed, retract if she desired to do so, for any cause operating upon her.

And when all these appeared in the certificate of the officer slight departure from the words of the law would not invalidate the certificate. So long as the substance of the statute was preserved, mere technical objections to it would not be favored.⁶⁷

If the acknowledgment is taken before the proper officer the exact language of the statute need not be used.

It is the doctrine of the courts that a certificate of acknowledgment of a deed need not be in literal compliance with the statute, it is sufficient if there be a substantial compliance therewith.⁶⁸

§ 1554. Surplusage in Certificate Immaterial—If words are found in a certificate of acknowledgment which is perfect without them, such redundancy cannot vitiate; they may be regarded as surplusage.⁶⁹

So the insertion of a word "notarial" before the word "seal" in the attesting clause of a certificate was held to

67—*Stuart v. Dutton*, 39 Ill. 91.

69—*Stuart v. Dutton*, 39 Ill. 91.

68—*Calimet & C. C. & D. Co. v. Russell*, 68 Ill. 426; *Alvis v. Morrison*, 63 Ill. 181.

be surplusage, in an acknowledgment taken by a justice of the peace.⁷⁰

§ 1555. **Effect of Acknowledgment**—An acknowledgment is of value only as showing that the instrument was in fact executed by the person whose name is signed to it.⁷¹

The certificate of acknowledgment of the officer taking the same is sufficient evidence of the due execution of the deed or instrument, when that question is called in question.⁷²

§ 1556. **Venue of Acknowledgment**—It must appear from the certificate of acknowledgment where it was made and certified, or by taking the acknowledgment and deed together, the court will be able to presume in what State it was taken. The officer taking it can only act within the territorial limits of his jurisdiction, and it must appear that the act was performed within those limits. So where the venue was only "County of New York," and there was nothing in the deed to indicate in what State the officer acted, the deed as to the interest of the grantee was inadmissible in evidence, without further proof of its execution.⁷³

The objection to a certificate of acknowledgment that the county is wanting in the venue may be overcome by proof that the officer who took the acknowledgment was an officer in the county wherein the trial was had at the time of taking the acknowledgment; courts will take judicial knowledge of the fact as to who are public officers in its county, and proof of the official character of such officers is not required, unless the particular question is directly put in issue.⁷⁴

A certificate of acknowledgment made by a clerk of a county, formal in every respect, except the name of the county was omitted from the margin, but the impression of the seal was "Will County Seal." While it might be ad-

70—Foster v. Latham, 21 Ill. App. 165.

71—Springer v. Orr, 82 Ill. App.

558.

72—Schroeder v. Smith, 249 Ill. 574.

73—Hardin v. Kirk, 49 Ill. 153.

74—Graham v. Anderson, 42 Ill. 514.

mitted that the certificate was informal, but it was nothing more. It is perfectly certain that the deed was acknowledged before the clerk of Will county, and attested under the seal of the county. Naming the county in the margin would scarcely make it more certain.⁷⁵

Although the certificate of acknowledgment may not contain a venue, but where the officer taking the acknowledgment signs his name and designates himself of a particular town the courts will take judicial notice of the county in which a certain town is located; and so they will take judicial notice of the counties of the State, and the number of townships within the county, courts will take judicial notice of its own officers and all public officers in civil affairs within its jurisdiction, especially as to who are justices of the peace. So where it can be ascertained by an inspection of the certificate that the officer taking the acknowledgment was a civil officer within the county wherein the court is sitting, the mere omission of the name of the county in the venue will not invalidate the certificate of acknowledgment.⁷⁶

But it is a well established rule that the courts of one county will not take judicial notice as to who are the civil officers of another county, especially as to who are justices of the peace of such foreign county.⁷⁷

§ 1557. Residence of Officer Taking Acknowledgment—

The legal presumption is that an officer taking an acknowledgment of a deed resides in the place of his jurisdiction, and that he acted in such place. It would be an unreasonable presumption to assume that an officer attempted to discharge his duties in some place other than the place where he was authorized to act.⁷⁸

§ 1558. Identity of Grantor—Where in the body of the conveyance the grantors were correctly named as Samuel

75—*Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 148.

76—*Gilbert v. National Cash Reg. Co.*, 176 Ill. 288.

77—*Weber v. Mick*, 131 Ill. 520.

78—*Hardin v. Osborne*, 60 Ill. 93;

Dunlap v. Dougherty, 20 Ill. 397.

B. Postley and Abraham B. Kain, but the deed was signed S. Brook Postley and A. Bowdoin Kain, and the officer taking the acknowledgment certified that he knew them to be the identical persons named in the deed as the makers thereof, it was held that the identity of the grantors with the persons signing the deed sufficiently appeared, and the conveyance was sufficiently executed.⁷⁹

§ 1559. Certificate When Acknowledgment is by Attorney in Fact—Where a deed is executed by the grantors by their attorney in fact, and the officer before whom it is acknowledged certifies that the attorney in fact was personally known to him as the real person whose name is subscribed to the deed as having executed the same as the attorney in fact of the grantors, and that the said attorney in fact appeared before him in person and acknowledged that he, as such attorney in fact, signed, sealed and delivered said deed as the free and voluntary act of the said grantors, and for the uses and purposes therein set forth, it was held to be sufficiently acknowledged.⁸⁰

§ 1560. Certificate of Acknowledgment to be Completely in Writing—The acknowledgment of a conveyance cannot rest partly in writing and partly in parol; it must all be in writing. The statute has declared that by this mode, and this mode only, can an acknowledgment be certified. It is not permissible to prove by oral testimony that it was in fact acknowledged.⁸¹

§ 1561. Certificate to be Signed by the Officer Taking Acknowledgment—The statute requires that the certificate of acknowledgment shall be signed by the officer taking it, and the only safe rule is to require this to be done in all cases of statutory acknowledgments. Affixing the official seal of the officer alone is not sufficient.⁸²

Where the closing words of a certificate of acknowledg-

79—Lyon v. Kain, 36 Ill. 362.

81—Ennor v. Thompson, 46 Ill. 214.

80—Reuter v. Stuchart, 181 Ill.

82—Clark v. Wilson, 127 Ill. 449.

ment are: "Before me, Benjamin Pinney, Commissioner of deeds for the State of Illinois," that is a sufficient signing. It is just as reasonable to say that this was a signature as to say it was only a recital.⁸³

A certificate of acknowledgment was signed by a clerk of a court of record by his deputy. It was objected to this that the acknowledgment should have been had before the clerk in person, but the objection was held to be not well founded. The acknowledgment purports to have been taken before the clerk, and is certified in his name, under the seal of the court. This *prima facie* is sufficient. The seal of the court proves itself, and it must be presumed that it was affixed by the proper officer.⁸⁴

If the officer professes, in the body of his certificate, to be acting officially, the court was of the opinion that the omission of words indicating his official title after his signature cannot have the effect of rendering his certificate invalid. It is enough if his official character, and that he was acting officially, appears in the certificate.⁸⁵

§ 1562. The Date of a Certificate of Acknowledgment is not important in establishing the identity or binding character of the instrument.

And it may be shown that there is a mistake in the date of such a certificate.⁸⁶

A mistake in the date of an acknowledgment is not material where no injury results therefrom to any person.⁸⁷

§ 1563. Seal of Officers to be Attached to Certificate—An acknowledgment of a deed taken before a notary public should be certified under his official seal. A notary public should certify his acts under an official seal, which every notary in whatever country, is presumed to have. Where this is not done, the admission of the deed in evidence,

83—Fisk v. Hopping, 169 Ill. 105.

84—Hope v. Sawyer, 14 Ill. 254.

85—Lake Erie & W. R. R. Co. v. Whitham, 155 Ill. 514.

86—Springer v. Orr, 82 Ill. App. 558.

87—Durfee v. Grinnell, 69 Ill. 371.

without further or other proof of its execution, is erroneous.⁸⁸

The statute requires that he shall have a seal by which such act shall be authenticated.⁸⁹

His private seal is not sufficient. The statute which authorizes public officers to use their private seals until an official seal is furnished, has no application to notaries public.⁹⁰

Although the attesting clause of a certificate of acknowledgment by a notary public may not recite that it is given under his official seal, yet if his official seal is in fact attached to the certificate it will be sufficient.⁹¹

Where it appears that a seal precedes the name of the justice of the peace who took the acknowledgment to a deed, the objection to it that there is no seal to the signature of the justice is merely technical and it should meet with but little favor. It is not requisite that the seal should follow the name of the justice, and the seal appearing as it did was held to be sufficient.⁹²

§ 1564. Homestead Estate Released—Statute—“No deed or other written instrument shall be construed as releasing or waiving the right of homestead, unless the same shall be contained in a clause expressly releasing or waiving such right. And in such case the certificate of acknowledgment shall contain a clause substantially as follows: “including the release and waiver of the right of homestead,” or other words which shall expressly show that the parties executing the deed or other instrument intended to release such right. And no release or waiver of the right of homestead by the husband shall bind the wife unless she join in such release or waiver.”⁹³

§ 1565. Constitutionality of Statute—The statute in regard to the acknowledgment of deeds or mortgages affect-

88—Booth v. Cook, 20 Ill. 129.

89—Dyer v. Flint, 21 Ill. 80.

90—Mason v. Brock, 12 Ill. 273.

91—Moore v. Titman, 33 Ill. 357.

92—Gilbreath v. Dilday, 152 Ill. 207.

93—Sec. 27, Ch. 30, R. S.

ing the homestead is not unconstitutional because it impairs the obligation of contracts. The legislature has the power to enact that such instruments shall not be effective in any way without an acknowledgment of a certain kind. Such a law only prescribes what shall constitute a valid contract.⁹⁴

§ 1566. Deed Affecting Homestead Must be Executed by Both Husband and Wife—A release and waiver of the homestead estate must be both executed and acknowledged by both the husband and wife; if the instrument fails to release the homestead estate, or the requisite clause is omitted from the certificate of acknowledgment the release is ineffectual; and both husband and wife must join in the execution and acknowledgment; one cannot release for the other, and if only one join in the release and acknowledgment, it is ineffectual as to the other.⁹⁵

§ 1567. Homestead Attaches if Deed from Man to Proposed Wife be not Delivered Before Marriage—Where a person in anticipation of his marriage, executed and acknowledged a deed for a house and lot to his intended wife, and handed the same to his attorney, with instructions to deliver it to his wife as soon as the marriage ceremony was celebrated, and two days after the marriage the attorney handed the deed to the grantor, who thereupon delivered the same to his wife, it was held that the delivery of the attorney did not constitute a delivery to his wife before her marriage, and that consequently a homestead estate attached to the premises, the same being so occupied at the time the husband delivered the deed to his wife.⁹⁶

§ 1568. Place for Recording Conveyance—Statute—“Deeds, mortgages, powers of attorney and other instruments relating to or affecting the title to real estate in this state, shall be recorded in the county in which such real

94—Parrott v. Kumpff, 102 Ill. 423.

96—Barrows v. Barrows, 138 Ill.

95—Trustees of Schools v. Hovey, 649.

94 Ill. 394.

estate is situated; but if such county is not organized then in the county to which such unorganized county is attached for judicial purposes.”⁹⁷

§ 1569. Place of Recording United States Patents—Patents for land from the United States do not come within the purview of the recording laws of the different states where the terms employed do not include them. The original record is in the General Land Office at Washington, from which patents are issued, and this record has been held to be notice to all the world of their existence.”⁹⁸

§ 1570. Place of Recording Deeds of Lands Set Off to Certain Indians Individually—The recording laws of the State of Illinois have no bearing on the question upon the provisions of a treaty with the Indian Tribes requiring the approval of the president to any conveyance made by certain Indian lands set off to them individually. The record of the approval of the President to such conveyances is preserved in the department at Washington and such a record is notice to all concerned from the time it is made. And the recording laws of Illinois do not require that a copy of that record should be recorded in the Recorder’s Office in the county where the lands are situated.”⁹⁹

§ 1571. Land Situated in Different Counties—Certified Copy May be Recorded—Statute—“Where an original deed, mortgage or other instrument relating to or affecting the title to real estate, having tracts of land therein described lying in different counties, it shall be lawful to record a certified copy of such deed or other instrument in counties where the original has not been recorded; and the record of such certified copy heretofore or hereafter shall be notice in the same manner that the filing and recording of the original would be, and copies from such records shall be prima facie evidence to the same extent as if the original had been so recorded.”¹

97—Sec. 28, Ch. 30, R. S.

99—Lomax v. Pickering, 165 Ill.

98—Lomax v. Pickering, 165 Ill. 431.

431.

431.

1—Sec. 29, Ch. 30, R. S.

§ 1572. Conveyances as to Creditors and Purchasers to Take Effect from Date of Filing—Statute—"All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record."²

Where a party claims the rights of a bona fide purchaser under the recording act, without notice of other conveyances, it must be made to appear that the grantee became a purchaser after the execution of the prior deed and before its record.³

Parties about to purchase securities, secured by mortgage or trust deed are bound to take notice of such matters as are of record which affect the mortgage or trust deed, and they are bound by whatever notice the records disclose, even though they do not examine them.⁴

§ 1573. Recording Instruments Not Obligatory—There is no principle, outside of self interest and prudence in business, that requires the holder of a mortgage to put it on record at any particular time. But by not doing so promptly, he runs the risk of having it postponed to a junior lien, and of losing the benefit of it altogether.⁵

§ 1574. Effect of Failure to Record Instrument—Where a grantee withholds his deed from the public records and thus puts into the power of his grantor to commit a fraud upon him, and he cannot be permitted to shift the loss caused by such a fraud upon subsequent purchasers without sufficient proof that they either participated in such fraud, or had notice of it before the purchase.

To thus permit the holders of such unrecorded deeds, at

2—Sec. 30, Ch. 30, R. S.

3—Schultz v. Houfes, 96 Ill. 335.

4—Rohde v. Rohn, 232 Ill. 180.

5—Field v. Ridgely, 116 Ill. 424.

the expense of others who subsequently deal with the property, to thus escape from the results of their carelessness or negligence, would nullify the statute and impede the sale and transfer of real property.⁶

§ 1575. Recording Documents Not Authorized by Statute Not Notice—It is only such documents as the statute authorizes to be filed that constitute notice to parties dealing with the land. So the filing of notice of a vendor's lien in the recorder's office is not constructive notice of such lien, and cannot be availed of as such.⁷

Although a mortgage, or a trust deed in the nature of a mortgage, are not assignable, yet the notes secured thereby are, and where a party takes the assignment of such notes if he desires to protect himself from frauds perpetrated by the mortgagee or trustee by the execution of a release thereof, it is his duty to procure an assignment thereof and record the same, otherwise he will be bound by such a release, and lose his security, if there be nothing on the record giving notice of his rights.⁸

§ 1576. Recording Undelivered Deeds—The recording of an undelivered deed, has no more effect than the record of a forgery.⁹

§ 1577. Recording Forged Deeds—The provisions of the recording act have no application to forged instruments, for they cannot affect the title one way or another. They are, therefore, not entitled to be recorded. It would be a dangerous doctrine to hold that one by forging a deed to himself and then putting it upon record, could then, by conveying it to a third party, having no notice of the forgery, confer upon the latter a good title, merely because the record showed a good title in the forger. If such were the law no man's title would be safe. The principles of justice and public policy alike forbid such a rule.¹⁰

6—*English v. Lindley*, 194 Ill. 181.

7—*Porter v. Clark*, 23 Ill. App. 567.

8—*Mann v. Jummel*, 183 Ill. 523.

9—*Stanley v. Valentine*, 29 Ill. 544.

10—*Fry v. Fry*, 109 Ill. 466.

§ 1578. Rights of Persons to Things Appearing on Public Records—One dealing with real property is entitled to the benefit of everything appearing upon the public records which will sustain his claim, whether he examines the record or not.¹¹

Provided the same is genuine.

§ 1579. Instrument Notice from Date of Filing for Record—After the recorder has received and filed a deed for record it is, in contemplation of law, recorded and becomes notice to the world.¹²

Although it may not then be actually recorded, and although the recorder in recording a deed may make a mistake therein, and misrecord the deed.¹³

§ 1580. Endorsement on Instrument Evidence of Recording Same—A certificate of a recorder upon a deed, giving the date, book and page of record, is presumptive evidence that the deed is recorded, and testimony of the strongest kind is required to destroy its effect.¹⁴

§ 1581. Filing of Instrument Must be in Good Faith to Constitute Notice—An instrument to become constructive notice, must in good faith, be filed for record, and left with the proper officer for that purpose. So where an instrument was presented to the recorder and by him marked "Filed for record," of a certain date, and then immediately withdrawn for the alleged purpose of having a proper government stamp placed thereon, and not returned for more than a month thereafter, is not sufficient to give constructive notice, within the intent of the registry law. Such conduct was either a trick, or an act of gross negligence, and it could not affect the public. The officer ought not to have permitted the withdrawal of the instrument after his file mark had been placed upon it.¹⁵

The statute makes the filing of a deed the same as the

11—Mann v. Jummel, 183 Ill. 523.

12—Kiser v. Houston, 38 Ill. 252.

13—Nattinger v. Ware, 41 Ill. 245.

14—Merrick v. Wallace, 19 Ill. 486.

15—Worcester Nat. Bank v. Chee-
ney, 87 Ill. 602.

recording of it. But where a deed of land is left by the grantor with the recorder, and the fees for recording paid, with directions not to record the same till ordered to do so, and before such orders are given another deed from the same grantor is filed and recorded, such first deed will not be held to have been filed for record within the meaning of the statute, and the grantee in the second deed will not be held charged with notice of the first deed.¹⁶

If the recorder permits the instrument to be withdrawn before being actually recorded, he places it within the power of the grantor to commit a fraud of the grossest kind upon innocent purchasers or subsequent incumbrancers.¹⁷

§ 1582. Right of Grantee to Record Deed—The consent of the grantor is not required in order to authorize the grantee to record a deed delivered to him by the grantor, unless there is an agreement that it shall not be recorded. Where the instrument is delivered the grantee may record it, and the fact that it was filed for record raises the presumption that it was delivered by the grantor to the grantee, and that it was rightly filed for record by the grantee or by some one acting for him in that behalf.¹⁸

§ 1583. Rights of Parties Not Affected by Alteration of Record—An alteration in the record of a deed cannot deprive an innocent party of the benefit of the original record.¹⁹

§ 1584. Object of Recording Act to Give Notice of Rights of Parties—The object of the recording act is to protect subsequent purchasers and judgment creditors against previous deeds and mortgages unrecorded, and that the recording of a deed is constructive notice only to those who have subsequently acquired some interest or right in the property; the recording of a deed affords no notice whatever to a prior purchaser who has promptly recorded his deed.

16—Haworth v. Taylor, 108 Ill. 275.

18—Spencer v. Razor, 251 Ill. 278.

17—Kiser v. Houston, 38 Ill. 252.

19—Merrick v. Wallace, 19 Ill. 486.

Such a purchaser is not required to search the record for the recording of deeds subsequent to the record of his own.²⁰

The record of a deed, made subsequent to the record of a mortgage, is not notice to the mortgagee nor to a person purchasing at a foreclosure sale of the mortgage. The registry laws have no application to such a case.²¹

Where an indebtedness, secured by a mortgage or trust deed, and which may be payable at any time at the option of the maker, a person dealing with the property has the right to rely upon the genuineness of a release duly executed and recorded, although such release was made before the actual maturity of the indebtedness by its terms.²²

The law protects the purchaser of real estate in his purchase of the same as the title appears of record, unless there be something shown to the contrary.²³

It is the recording of a deed which secures the title from being defeated by a subsequent sale by the original grantor to an innocent purchaser.²⁴

The record of a bond for the conveyance of land by the owner of the land is notice to subsequent purchasers and creditors of the owner, and they are bound thereby.²⁵

A purchaser is presumed to have notice of any defects appearing on the face of his title papers, or by the record;²⁶ but he is not required to look for latent defects in the chain of conveyances, when they are regular upon their face, and apparently conveying the legal title.²⁷

§ 1585. Presumption of Notice by Record Not Always Conclusive—The presumption that a party has notice of a deed from the record thereof, is not conclusive, but may be rebutted by evidence to the contrary, in a suit to avoid a

20—Lowden v. Wilson, 233 Ill. 340;
Boone v. Clark, 129 Ill. 466; Miller
v. Larned, 103 Ill. 562.

21—Alvis v. Morrison, 63 Ill. 181.

22—Carey v. Rauguth, 82 Ill. App.
418.

23—Booker v. Booker, 208 Ill. 529.

24—King v. Gilson, 32 Ill. 348.

25—Snapp v. Pierce, 24 Ill. 156.

26—Latham v. Illinois C. R. R. Co.,
253 Ill. 93.

27—Robbins v. Moore, 129 Ill. 30;
School Trustees v. Wright, 12 Ill. 432.

conveyance made by such party, on the alleged ground of ignorance of his rights in the premises, when the grantee is not a bona fide innocent purchaser for value, where the rights of innocent purchasers have not intervened. But in a contest between the grantor and an innocent purchaser from the fraudulent grantee, the record would be conclusive upon the former.²⁸

§ 1586. Oral Evidence Admissible to Show Contents of Unrecorded Deed—Oral evidence may be received as to the contents of a deed which has never been recorded upon proof that the deed was duly executed and delivered to the grantee and it was subsequently handed to the grantor to be kept in his safe for the grantee, and that after the death of the grantor diligent search was made in the safe of the grantor and among his papers and the deed could not be found.²⁹

§ 1587. Actual Notice of Unrecorded Deed—But the recording of a deed is not the only method by which notice of an unrecorded deed may be given.³⁰

An unrecorded deed is good as against those taking title to the land with actual knowledge of such unrecorded deed.³¹

Where a party has notice of the equities of a third party in certain lands, a purchase thereof by him invests him with no rights adverse to the interest of such third party.³²

The law is that if the second purchaser from the same grantor is chargeable with notice of a prior contract or conveyance then he but fills the shoes of the vendor, and either as his trustee for that purpose, or as his assignee, he shall make good the obligations which were imposed upon the grantor. If he is not chargeable with such notice, when the deed to him was executed and took effect, then he may hold under it, notwithstanding whatever rights, legal or equitable, may be shown to exist between the original vendee and the vendor.³³

28—*McCormick v. Miller*, 102 Ill. 208.

29—*Hawley v. Hawley*, 187 Ill. 351.

30—*Higgins v. White*, 118 Ill. 619.

31—*Rupert v. Mark*, 15 Ill. 540.

32—*Masters v. Mayes*, 246 Ill. 506.

33—*Doyle v. Teas*, 5 Ill. (4 Scam.) 202.

Notice of a prior unrecorded deed is as effectual as the registry of it. The object of recording the deed is to give notice to the world of the purchaser's claim of title, and when that end is obtained, whether by recording, or actual notice of such circumstances brought to the knowledge of the proposed purchaser or the creditor, as would induce a prudent man to make inquiry before he acted, the object of the statute is answered.

In all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by the description of the parties, recitals or otherwise, he must take cognizance thereof, and if he does not, it will be his own gross negligence.³⁴

It is not always true that actual notice of a prior deed is equivalent to notice given by the recording of it. As in case two persons have deeds for the same property from the same grantor of different dates, and they simultaneously learn of each other's deeds, and the holder of the first deed beats the other in a race to the recorder's office, and records his deed first. It cannot be supposed that his knowledge of the existence of the other deed, would destroy the effect of his record, and postpone his deed to the one subsequently recorded.³⁵

§ 1588. Constructive Notice of Unrecorded Deed—What is sufficient to constitute notice of a prior conveyance or contract is frequently a question of no small difficulty, and a subject upon which much has been written, and after all, not a great deal definitely settled. This notice is sometimes a question of law arising from facts about which there is no dispute, and it is sometimes a question of fact, to be determined by the evidence. The former is called constructive notice, and the latter actual notice. Constructive notice is frequently made out by *lis pendens*, by the record of the prior title or claim under the recording acts, by the

34—*Dean v. Long*, 122 Ill. 447;
Morrison v. Kelly, 22 Ill. 609.

35—*Worden v. Williams*, 24 Ill. 67.

possession of the person claiming an interest, or by the purchaser receiving his title through a channel, which, with proper attention, would have led him to a knowledge of the interest without notice of which he is charged.

Great difficulty has been experienced in laying down any general rule by which the courts can be governed as to the amount of evidence which is necessary to make out actual notice, for between the slightest and most indefinite information, and the most positive proof of actual knowledge, brought home to the person of the party, there is an infinite number of gradations, and where the true line of demarcation is, between the two extremes has never been distinctly settled so as to leave no difficulty in the application to individual cases as they may arise. There seems to be, indeed, two classes of cases, one of which appears to require the most clear and certain evidence of actual knowledge, such as will establish fraud on the part of the subsequent purchaser, while, on the other hand, such notice is only required to be proved, as will be sufficient to put a prudent man on inquiry. And search has been made in vain to find the distinction anywhere laid down, by which the court may be enabled to distinguish them in their features and circumstances.

By looking through the cases it will frequently be seen, that one judge holds to only sufficient to put a party on inquiry, while another will hold that the evidence must be sufficient to prove the party guilty of fraud, while others have differed very widely as to the amount of proof required. So that from an examination of the authorities, after all, hereafter as heretofore each case must be governed by its own peculiar circumstances; and when the court is satisfied that the subsequent purchaser has acted in bad faith, and that he either had actual notice, or might have had that notice, had he not wilfully or negligently shut his eyes against these lights, which, with proper observation, would have led him to knowledge, he must suffer the conse-

quences of his ignorance, and be held to have had notice so as to taint his purchase with fraud in law. It is sufficient if the channels which would have led him to the truth, were open before him, and his attention so directed that they would have been seen by a man of ordinary prudence and caution. The law will not allow him to shut his eyes when his ignorance is to benefit him, at the expense of another, when he would have had them open and inquiring, had the consequences of his ignorance been detrimental to him.³⁶

It will thus be seen that the courts of Illinois early adopted the more liberal rule in this matter, which has generally been followed by the courts of the state. It is safe to say, that the information received ought to be of that character that a prudent person, by the exercise of reasonable and ordinary diligence, could, upon inquiry and investigation, arrive at the fact that a prior conveyance had been made.³⁷

If anything apprises a purchaser or incumbrancer that a particular person claims the property, or an interest in it, the former must pursue that notice to its source, and that, failing to do so, he will be charged with all he would have learned had he pursued and investigated the matter to the full extent to which it led.³⁸

Where a party in the examination of the records finds the title in fee to the property to be in one person, and the records also show subsequent mortgage from a third person to such owner, such facts are calculated to raise a suspicion that the owner of record must have conveyed the property to such person by some conveyance not recorded. These facts are sufficient to awaken inquiry in the mind of a reasonably cautious man about to purchase the property. This is the measure of the obligation and good faith of the party

36—Doyle v. Teas, 5 Ill. (4 Scam.) 202.

38—Chicago & E. I. R. R. Co. v. Wright, 153 Ill. 307.

37—Chicago v. Witt, 75 Ill. 211;
Marx v. Oliver, 246 Ill. 316.

about to purchase the property, and he should make inquiry as to such a conveyance.³⁹

Where two tenants in common have each made a deed, one conveying the east half and the other the west half of the land, which deeds are duly recorded, such record will afford persons dealing with the property constructive notice, sufficient to put him on inquiry as to the fact that a partition had been made by the tenants in common before they executed their several deeds of conveyance.⁴⁰

The orders of the county commissioners court and memoranda of sales made by the county in its sales books are records; but still every matter of record is not constructive notice of the subject matter of it to all strangers.

In tracing title to or through the county, the party must go to the recorder's books and to the judicial records and levies, where the evidence of conveyances, contracts, incumbrances and liens are kept and to be found. And to defeat a purchaser's title from the county, by constructive notice or otherwise, the same rules and evidence must apply to all alike, according to the particular facts and circumstances of each individual case.⁴¹

The mere fact alone that a party found upon the record, deeds from parties who were strangers to the title as shown on the record, cannot be notice to him that the legal owner of the land as shown by the record had parted with his title. Such a rule would abrogate the recording laws of the state.

While a purchaser of land is bound to know what the record shows, whether he examines it or not, he has a right to rely upon the information it contains as to the person in whom it shows the legal title to be.⁴²

It may be conceded that as between a trustee and the cestui que trust a simple dry trust may be created between them by a declaration of trust by the trustee, but if

39—Ogden v. Haven, 24 Ill. 57;
Morrison v. Morrison, 140 Ill. 560.

41—Bourland v. Peoria County, 16
Ill. 538.

40—Markoe v. Wakeman, 107 Ill.
251.

42—Chicago v. Witt, 75 Ill. 211.

the declaration of trust be not recorded, and the legal title appears of record to be in the trustee, a sheriff's deed made on a levy and sale of the interest of the trustee in the land, the grantee therein will hold the title as against the cestui que trust, where the grantee had no notice of the equities of the cestui que trust.⁴³

When a proposed purchaser applies to a person who claims to have an interest in the property, and asks him whether or not he could convey a good title, and the reply is that he could not then but could in a short time, and he does not communicate to the proposed purchaser the party from whom he expects to obtain the title, or any information in regard to the title, the proposed purchaser is not charged with any notice of any defect in the title of the proposed vendor.⁴⁴

§ 1589. Proof of Notice by Direct Evidence—The fact of notice must be proved by direct evidence or by other facts from which it may be clearly inferred, and the inference must not be probable, but necessary and unquestionable. Mere suspicion will not raise an inference that the subsequent purchaser had notice of a prior unrecorded deed.⁴⁵

Proof of notice of an unrecorded deed must be made in the same manner, and its efficiency must be the same as that which would establish a fact in any other civil proceeding. Any circumstances which would put a prudent man on inquiry are sufficient.⁴⁶

There is no rule of law that to affect a party with notice he must have full, complete and accurate information of the nature, extent and all particulars of the objection to the title to the land with which he is dealing.⁴⁷

The title of a subsequent purchaser, who first places his deed upon the record, will not be defeated upon the ground that he had notice of a prior unrecorded deed of the same

43—*Home S. & S. Bank v. Peoria A. & T. Society*, 206 Ill. 9.

44—*Chicago v. Witt*, 75 Ill. 211.

45—*Lowden v. Wilson*, 233 Ill. 340.

46—*Morrison v. Kelly*, 22 Ill. 609; *McConnell v. Reed*, 5 Ill. 117.

47—*Crawford v. Chicago, B. & Q.*

R. R. Co., 112 Ill. 314.

premises, unless the proof of such notice is so clear and positive as to leave no reasonable doubt that the taking of the second conveyance was, under the circumstances, an act of bad faith toward the first purchaser. The fact of notice must be proved by direct evidence, or by other facts by which it may clearly be inferred; and the inference must not be probable, but necessary and unquestionable. Bare suspicion will not raise an inference of a fraudulent intent.⁴⁸

In a controversy between two purchasers of land from the same grantor, in an action in ejectment, the burden of proof is on the plaintiff to show that the defendant purchased in bad faith, or the want of any consideration; and where the first purchaser failed to record his deed, the presumption of law is that the second purchaser acquired title in good faith and for a valuable consideration.⁴⁹

Enough must be shown to impute to him bad faith so as to taint his purchase with fraud. Mere want of caution, as distinguished from fraudulent or wilful blindness, is not sufficient to charge a subsequent purchaser with constructive notice of an unrecorded deed.⁵⁰

The statutes of Illinois protect the purchasers of real estate in their purchases of the same as the title appears of record, unless there be notice of something to the contrary. In order, therefore, to affect a party who has taken a trust deed, in the nature of a mortgage, from one Conrad Eichenberg, of a judgment against one Charles Eichenberg, it is incumbent upon the party so claiming to make proof to the party taking the trust deed, at the time the same was taken had notice that such judgment was rendered against Conrad Eichenberg by the name of Charles Eichenberg. If the records show nothing of this kind, and there is no pretense of actual notice, nor any constructive notice, then there is not such notice as the law would imply from the

48—Robertson v. Wheeler, 162 Ill. 566.

50—Anthony v. Wheeler, 130 Ill. 128.

49—Ryder v. Rush, 102 Ill. 338.

facts and circumstances. So it was held that the party taking the trust deed was not affected by the judgment against Charles Eichenberg.⁵¹

But the entry of lands sold by the United States upon the land book in the county clerk's office, being only required for the purpose of taxation, affords no constructive notice of the facts appearing thereon to subsequent purchasers or grantees of the United States.⁵²

And where the records show a trust deed in the nature of a mortgage, which has been duly released of record by the trustee a purchaser will not be bound to search the records to see if a conveyance has been made by the trustee under the power in the trust deed after its release.⁵³

§ 1590. Possession Notice of Occupants Rights—The object of recording a deed is to afford future purchasers or incumbrancers of the grantor notice of the deed. But the recording of a deed is not the only method under which such persons may receive notice of a conveyance. Where a person obtains a deed, and enters into possession of the land, and continues in possession as owner, such possession is notice to all the world of the grantee's rights in the premises, under his unrecorded deed. Actual occupancy is equal to the record of a deed under which the occupant claims, and parties dealing with the land are bound to inquire by what right or title he holds.⁵⁴

And it is not the duty of the party in possession to volunteer the information of his rights in the land, it is the duty of the party purchasing the land to make inquiry as to such rights, and if he does not he takes it at his peril.⁵⁵

The law charges him with notice of all the rights of the party in possession.⁵⁶

A party dealing with real estate is bound to take notice

51—*Grundies v. Reed*, 107 Ill. 304.

55—*Dyer v. Martin*, 5 Ill. 146;

52—*Betser v. Rankin*, 77 Ill. 289.

McConnell v. Reed, 5 Ill. 117.

53—*Porter v. McNabney*, 77 Ill. 235.

56—*Whitaker v. Miller*, 83 Ill. 381.

54—*Higgins v. White*, 118 Ill. 619;
Adam v. Tolman, 180 Ill. 61.

of the physical condition and occupancy of the property and if in doing so he acquires information enough to prompt him to such further reasonable inquiry as, if made, would have advised him of certain facts he is bound by such facts.⁵⁷

Where a vendee takes possession of the property conveyed to him, by his agent or tenants, this is notice of his rights therein. A possession by a tenant is the same in all respects as if by the party himself, and he is protected in his title although his deed may be unrecorded.⁵⁸

Possession of a lot by a tenant of a party whose debt is secured by a deed of trust on the same, is notice to all subsequent purchasers and incumbrancers of the rights of the owner of such prior incumbrance.⁵⁹

Where the land in controversy is improved and under fence, the owner will not lose his possession by failing to be continuously in the actual occupancy or use of the property. The fact that a short time may have elapsed between the occupation by one tenant and the taking possession by another will not be a loss of possession by the owner. That which clearly indicates the possession will be sufficient to put others dealing with the property upon inquiry.⁶⁰

A deed taken without notice of a prior deed, followed by possession thereunder before such prior deed is recorded, will convey the better title, although it may not be recorded until the prior deed is recorded. This conclusion results from the effect of the recording acts. It is not necessary to refer to the doctrine of estoppel in order to sustain the junior deed as against the prior deed under such circumstances.⁶¹

§ 1591. Character of Possession to Operate as Notice—
Possession of property in order to be notice of the rights

57—O'Connor v. Mahoney, 159 Ill. 69.

60—Thomas v. Burnett, 128 Ill. 37.

61—Stevens v. Shannahan, 160 Ill.

58—Thomas v. Burnett, 128 Ill. 37. 330.

59—Crawford v. Chicago, B. & Q. R. R. Co., 112 Ill. 314.

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of the party claiming possession must be of an open and visible character, which will be calculated to apprise the world that the property has been appropriated and is occupied, and the occupancy must be exclusive.

Possession is only notice of the title under which it is held. Where at the time of the purchase there is one in possession, who holds adversely to the grantee, under an unrecorded instrument, in a subsequent contest concerning the title this possession can only be availed of as notice by such possessor and those under whom he claims to be in possession. It cannot be used either as notice or as evidence of notice of any title or interest claimed by a stranger; for the inquiry which it might be presumed to excite would not in the natural course of events develop the stranger's title. Where a purchaser finds his vendor in possession, either in person or by a tenant, he has the right to assume that such possession was rightfully obtained, unless he has knowledge or information to the contrary.⁶²

§ 1592. Notice to Ancestor Binding on Heir—Where the ancestor has notice of any fact or is charged with such notice, his heirs are likewise charged with the same notice.⁶³

§ 1593. Notice to Tenants in Common—If an incumbrance or conveyance be in existence affecting the title to land, and a purchase be made by several jointly or as tenants in common, those who have notice of the incumbrance or conveyance will hold their title in subordination to it, while those who did not have such notice will hold their title free from the claim to which their co-tenants are subjected. And this rule seems to prevail without qualification or exception.⁶⁴

§ 1594. Notice to Attorney or Agent Notice to Principal—The existence of an unrecorded mortgage, known to an attorney, who is employed by the mortgagor to make con-

62—Robertson v. Wheeler, 162 Ill. 566.

63—Fitch v. Miller, 200 Ill. 170.

64—Wait v. Smith, 92 Ill. 385.

fession of judgments in favor of certain creditors against the mortgage with the express purpose of giving such creditors a preference over the mortgagee, such knowledge on the part of such attorney may be imputed to such judgment creditors, who take the benefit of his acts, so as to charge them with notice of the existence of the mortgage.⁶⁵

Notice to a plaintiff's attorney in an attachment suit of an unrecorded deed of the land attached, prior to the levy of the attachment, is notice to the plaintiff in the case.⁶⁶

The knowledge of an agent which will affect the principal must be acquired during his agency and in the course of the same transaction in which the rights and liabilities of the principal arise, in order to affect the principal with notice, unless it is clear, from the evidence, that the information obtained by the agent in a former transaction is so precise and definite that it is or must be present to his mind and memory while engaged in transacting the business of his principal.⁶⁷

The rule that the knowledge of an agent must be acquired during his agency, and in the course of the same transaction, from which the rights and liabilities of the principal arise in order to affect the principal with notice, has no application where it is clear from the evidence that the information obtained by the agent in a former transaction was so present and definite, that it is or must be present in his mind and memory while engaged in the second transaction, and where the agent is at liberty to communicate his information to the principal, and that it was his duty so to do.⁶⁸

§ 1595. Misdescribed Premises as Notice—The recording of a deed of land affords notice to subsequent purchasers so far as the land therein mentioned is described aptly and intelligently, but no further. So if there is a misdescrip-

65—Haas v. Sternbach, 156 Ill. 44.

68—Snyder v. Partridge, 138 Ill.

66—Polk v. Cosgrove, 4 Biss. 436. 173.

67—Burton v. Perry, 146 Ill. 71.

tion of a portion of the land intended to be conveyed, subsequent purchasers are not bound to know that other land than that embraced in the misdescription was sold and intended to be described.⁶⁹

If a description in a deed is sufficient in law to designate the premises intended to be conveyed, the record of it is sufficient to put a person dealing with the property on inquiry, although the description may be somewhat defective. A reference to other documents in the description in the deed may be such as to make the description perfect, and give ample notice to parties dealing with the property.⁷⁰

The record of a deed, wherein the premises are misdescribed, is notice only so far as the premises are correctly described, unless it is apparent from the record itself that a mistake has been made in the description of the premises.⁷¹

A mistake by the recorder in recording a deed does not make the deed void, as against a subsequent purchaser or judgment creditor without notice. The recording of a deed, describing the premises by an impossible sectional number, is sufficient to put a party purchasing from the same grantor upon inquiry—and may amount to notice of a prior grant.⁷²

§ 1596. Purchasers at Judicial Sales Chargeable with Notice—A purchaser at a judicial sale is chargeable with such notice as the record of the proceedings, under which he derives title discloses; and he will be presumed to have examined the same before becoming a purchaser. So where the proceedings by the assignee in bankruptcy show sufficient on their face, to one familiar with them, to put a purchaser upon inquiry as to the bankrupt's title, he will be chargeable with notice of such facts, as among other things that the bankrupt had not scheduled the property as a

69—Wait v. Smith, 92 Ill. 385.

70—Warden v. Williams, 24 Ill. 67.

71—Harms v. Coryell, 177 Ill. 496.

72—Merrick v. Wallace, 19 Ill. 486.

part of his assets, and most of the property was in the possession of parties claiming to be the owners thereof. This of itself would be sufficient to arouse the suspicion of the infirmity of the title of the bankrupt and should require the purchaser to take cognizance of it, or chargeable with notice of what it contained, to inquire into the title and ascertain whether the bankrupt owned the property.⁷³

Administrator's deeds are within the statute for the recording of deeds. But the record of a decree of a County Court authorizing the sale of lands to pay debts is not constructive notice of the making of an administrator's deeds, even though such decree may be in a court in the county wherein the lands are situated. An unrecorded administrator's deed, in the absence of actual notice of it, or the proceedings under which it was obtained, is not such constructive notice as will invalidate the title of a subsequent bona fide purchaser.⁷⁴

A deed made by a master in chancery in pursuance of, and which recites a decree rendered against the party not personally served with summons, is notice to all persons claiming under it that such decree is not final, but is liable to be vacated and set aside, and if such decree is so vacated and set aside within the time limited, all rights under it, and all acts performed in the execution of it, are also annulled.⁷⁵

Where an abstract of title fails to show that a deed was made by an administrator in a proceeding instituted by him for the purpose of selling lands to pay the debts of the deceased owner, but merely that the premises were sold, such proceedings cannot be regarded as constructive notice as will invalidate a title derived from the heirs of the decedent.⁷⁶

73—Webber v. Clark, 136 Ill. 256.

75—Martin v. Gilmore, 72 Ill. 193.

74—Anthony v. Wheeler, 130 Ill. 128.

76—Robertson v. Wheeler, 162 Ill. 566.

As a general rule, parties dealing with real estate are only required to search the records of deeds to ascertain the condition of the title, but any notice, or circumstances which tend to give notice, or that which informs the party that there is an incumbrance or other claim upon the property is sufficient to charge him with notice. So where an administrator was directed to sell the lands of his decedent, and to take back a mortgage for the unpaid purchase money, and a sale was made as directed and a mortgage taken back by the administrator, and this fact reported to the court and the transaction duly approved by the court, but the administrator failed to record his mortgage until after the grantee had made another mortgage to a third party, it was held that the proceedings by the administrator were sufficient to put the second mortgagee upon inquiry as to the payment of the first mortgage, and failing to do so his mortgage became a second lien on the premises.⁷⁷

§ 1597. Bona Fide Purchaser from Vendor, Without Notice of Equities, Protected Though Vendor has Notice— A bona fide purchaser, without notice of the rights of third parties, from his vendor, who has notice of such rights, will be protected both in law and equity against such secret rights.⁷⁸

§ 1598. Purchaser with Notice of Equities from Vendor, Without Such Notice, Protected in his Title—The principle is well settled that although a purchaser may have notice of the equities of a third party, yet if he acquires his title from a party who did not have such notice, he acquires a good title even as against such equities.⁷⁹

A purchaser from a grantee who obtained title in good faith and for value, without notice of prior equities, will

77—*Ætna Life Ins. Co. v. Ford*, 89 Ill. 252.

78—*Prevo v. Walters*, 5 Ill. (4 Scam.) 35.

79—*Peck v. Arehart*, 95 Ill. 113; *Burton v. Perry*, 146 Ill. 71.

be protected from such equities although he may have had notice thereof himself.⁸⁰

§ 1599. Simultaneous Recording of Documents—Where two incumbrances on real estate are recorded at the same time neither has priority over the other in this regard. But that which is first in order of time of execution is first in right. That which is first in order of time is good as against all persons except subsequent purchasers whose conveyances are first recorded, and where both instruments are recorded at the same time there can be no case of first record.⁸¹

Where the certificates upon documents show that they were all filed at the same time, the mere fact that the recorder gave the documents different numbers will not give the one with the lowest number priority over the others; they will all stand on an equality in this regard.

And this case is not in conflict with the case of *Brookfield v. Goodrich*, 32 Ill. 363, where two instruments were filed the same day, but given different numbers, it was held that the one having the lowest number would be presumed to have been first recorded. But that was a mere presumption.⁸²

§ 1600. Dealings Between Fiduciaries—The law seems to be well settled that where parties occupying fiduciary relations to each other the utmost fair dealing is required between them. But men who may be associated together in business, or as officers or members of a corporation, are as free to deal with each other, and with others, as are men not so associated, without the imputation of acting fraudulently, unless, indeed, their relations of a fiduciary character, where, as in some cases, their dealings may be constructively fraudulent, even though there be no fraudulent intent.⁸³

80—*English v. Lindley*, 194 Ill. 181.

82—*Schaeppi v. Glade*, 195 Ill. 62.

81—*Schultze v. Houfes*, 96 Ill. 335;
Deining v. McConnell, 41 Ill. 227.

83—*English v. Lindley*, 194 Ill. 181.

Fiduciary relations do not arise out of kinship alone, and if the evidence does not show fiduciary relations, by the proof of other facts, then such do not exist.⁸⁴

§ 1601. Record Only Notice as to Property Within the Chain of Title—The rule announced by the court that where deeds are recorded, a purchaser is put on inquiry as to the title, and must be held to have examined the records and have seen the deeds thus recorded, was not intended to, and does not, when properly understood, assert the broad and unqualified doctrine that every purchaser or mortgagee is charged with notice of every fact which may appear upon the records, without regard to the fact whether it falls within his chain of title or not.

If such were the rule it would require every record which might possibly affect real estate to be thoroughly examined before a party could be protected in taking title to or a lien upon real estate, the expense and burden of which would practically put an end to all transactions of that kind. The law imposes no such burden. Parties are not required to run through the alphabet and see, if by some possibility, in some deed, no matter by whom, that somebody has some interest in the property.⁸⁵

So where the record shows a mortgage from one who had only an equitable title by way of a bond for a deed, which was not recorded, a purchaser of the property from one in possession claiming title will hold the same as against the holder of the mortgage, although it was duly recorded.⁸⁶

A purchaser is presumed to have notice of any defect of title appearing on the face of his title papers, or by the record, but is not required to look for latent defects in the chain of conveyances, when regular upon their face and apparently conveying the legal title.⁸⁷

84—*Kosturska v. Bartkiewicz*, 241 Ill. 604.

85—*Kerfoot v. Cronin*, 105 Ill. 609;
Chicago & E. I. R. R. Co. v. Wright,
153 Ill. 307.

86—*Rohde v. Rohn*, 232 Ill. 180.

87—*Robbins v. Moore*, 129 Ill. 30.

§ 1602. Record as Notice as to Amount of Mortgage—

The spirit of our recording acts requires that the record of a mortgage should disclose, with as much certainty as the nature of the case will admit, the real state of the indebtedness. If the mortgage is given to secure an ascertained debt, the amount of the debt should be stated, and if it is intended to secure a debt unascertained such data should be given respecting it as will put any one interested upon inquiry, and upon the track leading to a discovery. If it is given to secure a future liability, the foundations of such liability should be set forth. These requirements prevent secret conspiracies between the mortgagors and mortgagees as to the fact and amount of the indebtedness to the prejudice of subsequent purchasers or creditors, by compelling them at once to make known the real claim. In some instances, subsequent dealers with mortgaged property could not have information from the holder of the indebtedness secured by the mortgage, because they might not be able to find them, and it might often be perilous to rely upon the word of the mortgagor.

The simple recital in a trust deed or mortgage that the grantor had made his promissory note, without giving the amount thereof, will not charge a subsequent bona fide purchaser without actual notice of the actual amount of the note, to secure which the trust deed or mortgage was given.⁸⁸

§ 1603. Recording Assignment of Mortgage—The recording laws of this state contemplate the recording of an assignment of a mortgage, as well as other instruments relating to real estate, and it is the duty of the assignee of a note secured by a mortgage, if he desires to protect himself from frauds perpetrated by the mortgagor or mortgagee, to procure an assignment of the mortgage and have it duly recorded; otherwise innocent parties dealing with the property without notice of his rights, will hold the same adversely to him.⁸⁹

⁸⁸—*Bullock v. Battenhausen*, 108 Ill. 28.

⁸⁹—*Turpin v. Ogle*, 4 Ill. App. 611.

§ 1604. Destruction of Record Does Not Destroy Notice of Record—The burning of the recorder's office and the records therein contained does not destroy the notice which the record of a document relating to real estate gives under the statute.⁹⁰

And the omission of the parties to restore the record, destroyed by fire, does not invalidate the notice which the prior record of the instrument affords under the statute.⁹¹

While the record of a deed may in general be notice of its contents, even though the same may be destroyed, yet where by the decree of a court of competent jurisdiction the contents of the deed is incorrectly decreed, such destroyed record cannot be regarded as constructive notice of the contents of the deed so incorrectly found and decreed.⁹²

§ 1605. Recording Unacknowledged Deed Notice—Not Evidence Till Execution is Proved—Statute—"Deeds, mortgages and other instruments of writing relating to real estate shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proved according to law; but the same shall not be read in evidence, unless their execution is proved in the manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof."⁹³

The object of the recording laws in permitting such unproved instruments to be filed is not to preserve the evidence of title, but to give notice of claim. The record does not prove anything.⁹⁴

§ 1606. Documents Entitled to be Recorded—Before instruments affecting the title to real estate can properly be recorded, they must be acknowledged or proved as provided by the statute. When not so acknowledged or proved they may still be filed and recorded and operate as notice

90—*Alvis v. Morrison*, 63 Ill. 181;
Franklin Savings Bank v. Taylor, 131
Ill. 376.

91—*Shannon v. Hall*, 72 Ill. 354.

92—*Taylor v. Franklin Savings
Bank*, 50 Fed. 289.

93—Sec. 31, Ch. 30, R. S.

94—*Winter v. Dibble*, 251 Ill. 200.

and take effect. But for the purposes of evidence their execution must be proved, as required by law. By the language of our statute everything is comprehended that may relate to or affect the title to real estate, and requires all such to be recorded without any qualification as to whether they are sufficient in law, or not, to effectuate the object purported on their face. It would seem to be the intention of the legislature, in general, to make the registry and recording books as complete a depository as possible of land titles in the state as they may be presented and affected by conveyances, contracts, incumbrances and liens. The requirement of the law is not confined to such of them only, as are duly or legally, or defectively acknowledged or proved.⁹⁵

A contract by which a vendor agrees to convey to a railroad company certain lands upon the condition that certain crossings should be constructed by the company is such a one as relates to or affects the title to real estate as entitles it to be recorded under section 28 of the Conveyance Act.⁹⁶

A written contract giving the right to use the fences of a trotting park for advertising purposes involves by implication the right of way upon the land to enjoy such use and such written contract is an instrument in writing relating to land and when recorded in the proper office is notice to subsequent purchasers and creditors, under the statute, of the rights thereby conferred.⁹⁷

Resolutions adopted by a private corporation are not such instruments as are entitled, under the statute, to be recorded, and a certified copy thereof by the recorder is not admissible in evidence.⁹⁸

§ 1607. Creditor Defined—A creditor within the meaning of the recording act of the state, is one without actual or

95—Reed v. Kemp, 16 Ill. 445;
McCormick v. Evans, 33 Ill. 328.

96—Baltimore & S. E. R. R. Co. v.
Brubaker, 217 Ill. 462.

97—Willoughby v. Lawrence, 116
Ill. 11.

98—Mullanphy Savings Bank v.
Schott, 135 Ill. 655.

constructive notice of a prior conveyance or incumbrance, institutes such proceedings or takes such steps as effect a lien upon the land before the record of such conveyance or incumbrance, whether the debt be prior or subsequent to them, and whether the vendor at the time of making such conveyance or incumbrance, had other property or not. This definition has been followed in many cases.⁹⁹

§ 1608. Attaching Creditor—An attaching creditor who levies his attachment without notice of an unrecorded deed by his debtor, either actual or constructive, acquires a lien, which, if perfected by judgment, execution sale and deed, will hold the legal title as against the holder of the unrecorded deed. Having acquired a lien as an innocent creditor without notice, he will have the right to enforce the same, notwithstanding he may, subsequent to the levy of his attachment, have received notice of the unrecorded deed.¹

§ 1609. A Judgment Lien Attaches to Whatever Interest is Shown by the Public Records to Be in the Judgment Debtor—It is the settled law of this state that a judgment lien attaches to whatever interest in real estate the public records show to be in the judgment debtor, in the absence of notice from other sources; and a notice, at the time of the levy of the execution and the sale, of an unrecorded deed or mortgage will not affect the lien of the judgment.

But if a creditor had notice of such unrecorded deed or mortgage before he recovers his judgment, on a sale under an execution issued in his judgment and a purchase by him he takes his title subject thereto.²

§ 1610. Judgment Creditor and Subsequent Purchaser Occupy Same Position—A creditor who has obtained a judgment against a party in whom the title of real estate appears of record and before the record of a deed from the debtor to a third party occupies the same position as a

⁹⁹—*Martin v. Dryden*, 6 Ill. (1 Gilm.) 187; *Noe v. Montray*, 170 Ill. 169.

¹—*Thomas v. Burnett*, 128 Ill. 37.
²—*Columbus Buggy Co. v. Graves*, 108 Ill. 459.

subsequent purchaser without notice within the meaning of the Conveyance Act, although he may receive notice of such unrecorded deed before he sells the property on a levy of an execution issued on his judgment.³

§ 1611. Subsequent Purchaser Defined—A subsequent purchaser is one who in good faith and for a valuable consideration acquires title or an interest in the property subsequent to the execution of an unrecorded deed without notice of such deed.

Before a party can make out his defense as an innocent purchaser he must show that he was a purchaser for a valuable consideration. If he is a mere volunteer, or became liable for nothing, as a consideration for the conveyance, then he has not suffered, nor can he suffer any loss. If he paid a consideration he should show it, and what sum was paid.⁴

Where a party takes a conveyance of land it will be presumed that he was a bona fide purchaser, and the burden of proof to show bad faith or want of consideration lies upon those attacking the deed.⁵

The true and proper construction of the statute is, that a deed from the heir shall prevail over the unrecorded deed from the ancestor, and this construction is placed upon the broad ground that the expression "subsequent purchaser" means a subsequent purchaser from the heir as well as from the original grantor himself. This construction meets the object designed to be accomplished by the law, and is within the reason which gave rise to the enactment of the statute.⁶

And applies also to purchasers at judicial sales.⁷

§ 1612. Exchange of Property a Valuable Consideration—Where one of several heirs exchanges, for the interest of his co-heirs in a certain tract of land which they had in-

3—Smith v. Willard, 174 Ill. 538;
Columbus Buggy Co. v. Graves, 108
Ill. 459; Gary v. Newton, 201 Ill. 170.

4—Kiser v. Houston, 38 Ill. 252.

5—Anthony v. Wheeler, 130 Ill. 128.

6—Kennedy v. Northup, 15 Ill. 148.

7—Burton v. Perry, 146 Ill. 71.

herited from their father, his interest in other parcels of land which descended to him in the same way, he will be protected, as a purchaser for a valuable consideration, in his title so acquired from his co-heirs as against a prior unrecorded deed from the same ancestor, of which he had no notice.

But he cannot claim and hold that portion of the land which came to him by inheritance, as against such prior unrecorded deed from the ancestor, because would take such portion as a mere volunteer.⁸

§ 1613. Deed by Assignee in Bankruptcy—A mere holder of the legal title to property in trust for another is not its owner, and, as a general rule, such property is not liable for his debts. An insolvent debtor making an assignment of his property and effects, can pass no greater title than that of which he was possessed. His assignee can assert no greater title than his assignor could assert, and the same rule applies, with some exceptions, to bankrupt estates. The assignee takes a bankrupt estate subject to all liens and affected with all equities that exist against the property in the hands of the bankrupt. The assignee takes the property as a volunteer. But the recording act provides that all deeds and title papers shall be adjudged void as to all creditors and subsequent purchasers, until the same shall be filed for record and this statute has been held to apply to judicial sales.

So a purchaser at a bankrupt sale will be protected in his purchase against a prior unrecorded deed of the bankrupt, if the purchaser had no notice thereof, and is not chargeable with facts that put him upon inquiry.⁹

§ 1614. Legal Representative Defined—The term "legal representative" in the commonly accepted sense, means the executor or administrator, but this is not the only defini-

8—Bowen v. Prout, 52 Ill. 354.

9—Webber v. Clark, 136 Ill. 256;

Ryder v. Rush, 102 Ill. 338.

tion; and it may mean heirs, next of kin or descendants, and sometimes assignee or grantee, and the sense in which the term is to be understood depends upon the intention of the parties using it, and is to be gathered, not only from the instrument itself, but as well from the surrounding circumstances and the existing state of things, and the relative situation of the parties to be affected by it.

So the expression "legal representatives" used in a power of sale in a mortgage, is broad enough to include the heirs, executors and administrators "in delegating the power to execute a deed."¹⁰

§ 1615. Acknowledgment Unnecessary to Validity of Deed—A deed is wholly complete when it is signed, sealed and delivered by the grantor, without an acknowledgment. The only consequence of a want of the usual certificate of acknowledgment would be that the grantee, if under the necessity of using the deed as evidence, would be obliged to prove its execution.¹¹

The fact that a deed is not recorded will make no difference so far as the passage of the title from the grantor to the grantee is concerned, as between the parties or their heirs, the deed having been duly executed and delivered.

It is not the recording of the deed that passes the title, but it only secures the title from being defeated by a subsequent sale of the land to an innocent purchaser.¹²

§ 1616. Statute Passed in 1837, Has no Retroactive Effect—It was not the design of the legislature in passing the Act of 1837, that it should have a retroactive effect, nor will the courts give that construction. That act only declares that instruments relating to or affecting the title to real estate when recorded shall be notice, although not properly proved or acknowledged.¹⁴

So where deeds not acknowledged so as to entitle them

10—*Stevens v. Shannahan*, 160 Ill. 330.

11—*Seaver v. Spink*, 65 Ill. 441.

13—*King v. Gilson*, 32 Ill. 348.

14—*Deining v. McConnell*, 41 Ill. 227.

to be recorded, are in fact recorded, acts of the legislature declaring such deeds to be notice, has no retroactive effect but both deeds will be presumed to have been recorded simultaneously at the time such acts go in force, and the oldest deed will have the preference and prevail over the junior deed.¹⁵

§ 1617. Proof of Execution of Unacknowledged Deed Necessary Before Their Record Will Be Held as Notice—The effect of the statute is to establish and declare the recording of an unacknowledged or improperly acknowledged instrument notice as to subsequent purchasers and creditors, and this shall be from the time of their record. But before the instrument can be read for the purposes of showing of what the party had this constructive notice, the defects of such acknowledgment must be supplied by proper proof of its execution in the manner required by the rules of evidence applicable to such writing. The full scope and spirit of the recording acts do not require a limitation of their meaning, where language of a much broader and general import is used, and which in its larger sense does not conflict but harmonizes with, and more fully carries into effect the general objects and spirit of the whole system.¹⁶ (See *ante* § 1605.)

§ 1618. Deeds Executed Under Powers—It is well settled law that if a deed purports to be executed under a power, and it is sought to be used as evidence, the power must be shown.

Prima facie administrators and executors have no power to make deeds conveying the land of their deceased, and until such power is shown, by competent proof, a deed so executed is not admissible in evidence as a monument of title.

And if such power is exercised under a decree of court, it must appear on the face of the decree. The jurisdiction

15—Noakes v. Martin, 15 Ill. 118.

16—Reed v. Kemp, 16 Ill. 445.

of the court to make the decree must be shown on the face of the proceedings.¹⁷

The mere fact that the deed is thirty years old is not in such case sufficient to admit it in evidence.

There seems to be some difference of opinion in the text writers and the decisions of the courts, as to whether the execution of a valid power of attorney will be presumed in favor of an ancient deed when such deed purports to be executed by an attorney in fact. The weight of authority seems to be in favor of such presumption, and it is said the existence of a valid power of attorney will be presumed in favor of an ancient deed. In most cases where the deed would be admitted in evidence as an ancient deed, without proof of its execution, the power under which it purports to be executed, will be presumed.

Seemingly at variance with this rule, the case of *Fell v. Young*, 63 Ill. 106, may be cited. In that case the deed in question was made by an administrator, and failed to show upon its face that the court, which ordered the sale, had jurisdiction of the parties to be affected by it. And it was held that in cases involving the jurisdiction of courts ordering the sale of real estate, it was necessary that the party making the sale should show his power to do so upon the face of his proceedings.

But in case where the deed is executed under a power of attorney, proof of the power is only one of the facts to make out the due execution of the deed, and the due execution of the deed is presumed in the case of an ancient deed in view of the length of time which has elapsed, and in view of possession taken, and other acts done under the deed.¹⁸

§ 1619. Deeds of Officers Recordable—Statute—“All deeds which may be executed by any administrator, executor, guardian, conservator, commissioner, master in chancery, sheriff or other officers of any real estate sold in pur-

17—*Fell v. Young*, 63 Ill. 106.

18—*Reuter v. Stuckart*, 181 Ill. 529.

suance of any decree or on execution upon being acknowledged or proved before any officer authorized to take acknowledgments or proof of deeds, and certified as other deeds, and shall be admitted of record in the county where the real estate sold is situated.”¹⁹

An acknowledgment is no part of a sheriff's deed, and if not acknowledged, it is valid, but its execution must be proved the same as in cases of unacknowledged deeds.²⁰

§ 1620. Wills Entitled to Be Recorded—Statute—“All original wills duly proved, or copies thereof duly certified, according to law, and exemplifications of the record of foreign wills made in pursuance of the laws of Congress in relation to the records in foreign states, may be recorded in the same office where deeds and other instruments concerning real estate may be required to be recorded; and the same shall be notice from the time of filing the same for record as in other cases, and certified copies of the record thereof shall be evidence to the same extent as the certified copies of the record of deeds.”²¹

In this connection the 9th section of the Statute of Wills should be read. It is: “All wills, testaments and codicils or authenticated copies thereof, proven according to the laws of any of the United States, or the Territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this state, accompanied with the certificate of the proper officer or officers that said will, testament, codicil or copy thereof was duly executed and proved, according to the laws and usages of the state or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law in like manner as wills made and executed in this state.”²²

Section 9 of the Act on Wills and the 33rd section of the Conveyance Act are to be read together, and unless an au-

19—Sec. 32, Ch. 30, R. S.

21—Sec. 33, Ch. 30, R. S.

20—*Stephenson v. Thompson*, 13 Ill.

22—Sec. 9, Ch. 148, R. S.

thenticated copy of a foreign will is recorded as therein required, it does not operate as notice to third parties acquiring interest in the property adverse to the devisee where the certificate accompanying the will does not state that the will is "duly executed and proved according to the laws and usages" of the state or country where the will was made; and where no exemplified or certified copy of the will has been recorded in the State of Illinois.²³

But a will executed in a foreign state, or an exemplified copy thereof, proved according to the laws of the foreign state and recorded in this state is "good and available in law, in like manner as wills made and executed in this state," and it is not necessary that the will should be probated in this state, as a matter of evidence, although it will not be notice to innocent third parties dealing with the property, unless the will, or a properly certified copy thereof, is duly recorded in this state.²⁴

§ 1621. Deed of Foreign Representative Under Will—Statute—"Where, in pursuance of due power vested by will executed and proved out of this state, deeds conveying lands in this state, heretofore have been or hereafter shall be executed by executors or administrators with the will annexed, duly appointed and qualified in any state of the United States, the same shall be evidence of title in the vendee or grantee, to the same extent as was vested in the testator at the time of his death, whether such will has been proved in this state or not, unless at the time of executing such deeds, letters testamentary or letters of administration upon the estate of the deceased shall have been granted in this state and remain unrevoked."²⁵

§ 1622. Statute Applies to Natural Persons, Not to Corporations—Section 34 of the Conveyance Act provides for the recording of foreign wills when the same are properly

23—Bliss v. Seeley, 191 Ill. 461;
Harrison v. Weatherby, 180 Ill. 418;
Catholic University of America v.
Boyd, 227 Ill. 281.

24—Stull v. Veatch, 236 Ill. 207.
25—Sec. 34, Ch. 30, R. S.

certified, and the exercise of the powers therein mentioned applies to cases where the trustees and executors are natural persons, and not to foreign corporations who have not complied with the laws of the state in regard to obtaining a license to do business herein.²⁶

§ 1623. Acknowledged Deed and Certified Copy Thereof to Be Evidence—Statute—“Every deed, mortgage, power of attorney, conveyance, or other writing, of or concerning lands, tenements or hereditaments, which, by virtue of this act, shall be required or entitled to be recorded as aforesaid, being acknowledged or proved according to the provisions of this act, whether the same be recorded or not, may be read in evidence without further proof of the execution thereof; and if it shall appear to the satisfaction of the court that the original deed, so acknowledged or proved and recorded, is lost, or not in the power of the party wishing to use it, the record, or a transcript thereof, certified by the recorder in whose office the same may be recorded, may be read in evidence, in any court in this state, without further proof thereof.”²⁷

§ 1624. Certified Copy of Record Secondary Evidence Only—Under the provision of Section 35 of the chapter on Conveyances the record of a deed or instrument does not become primary proof, but it may be resorted to as secondary evidence upon its appearing, to the satisfaction of the court, that the original instrument so acknowledged or proved and recorded is lost or not in the power of the party wishing to use it.²⁸

§ 1625. Statute Applicable to Any Instrument Affecting Real Estate—That portion of the statute which provides that “other writings of or relating to the sale, conveyance or other disposition of real estate or any interest therein, whereby the rights of any person may be affected in law or equity” when acknowledged before certain named

26—*Pennsylvania Co. v. Bauerle*,
143 Ill. 459.

27—Sec. 35, Ch. 80, R. S.

28—*Winter v. Dibble*, 251 Ill. 200.

officers shall be evidence of the proper execution thereof, is broad enough to embrace the resignation of a trustee in a trust deed and the appointment of his successor; and the admission in evidence of such instruments, when properly acknowledged, is not error.²⁹

A will relating to the title to real estate must be held to come within scope of these remedial statutes, and may be established, if the record thereof is destroyed, by secondary evidence.³⁰

§ 1626. Proof of Loss of Deed, Record or Certified Copy, Evidence—Statute—“Whenever, upon the trial of any cause in law or equity in this state, any party to said cause, or his agent or attorney in his behalf, shall, orally in court, or by affidavit filed in said cause, testify and state under oath that the original of any deed, conveyance or other writing, of or concerning lands, tenements and hereditaments, which shall have been, or may hereafter be acknowledged or proved according to any of the laws of this state, and which, by virtue of any of the laws of this state, shall be required or be entitled to be recorded is lost, or not within the power of the party wishing to use it on the trial of any such cause, and to the best of his knowledge said original deed was not intentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof, certified by the recorder in whose office the same conveyance or other writing, or a transcript of the record thereof, certified by the recorder in whose office the same may have been or may hereafter be recorded, may be read in evidence in any court in this state, with like effect as though the original of such deed, conveyance or other writing was produced and read in evidence.”³¹

The provisions of sections 35 and 36 of the Conveyance Act relating to the introduction of a copy of the record of any deed or conveyance, on the statement orally in open

29—*Lake v. Brown*, 116 Ill. 83.

31—Sec. 36, Ch. 30, R. S.

30—*Kotz v. Belz*, 178 Ill. 434.

court or by an affidavit under oath as therein required were simply designed to lay the foundation for the introduction of the record of such instrument, but they have no reference to the introduction of other secondary evidence where both the original instrument and the record thereof have been destroyed, and are not within the power of the party to produce the same.

That condition of affairs is covered by section 29, chapter 116, commonly known as the Burnt Record Act.³²

An index and a file book, saved from the destruction of the public records by fire, in which was given the names of the parties to the instrument, a description of the premises, the date of the instrument, and the date of its record, were held to be properly admissible in evidence, even before the passage of the Burnt Record Act.³³

In close connection with section 36 of the chapter on Conveyances, should be read sections 23 and 24 of the Burnt Record Act, which is embodied in the chapter 116 on Records. This section is as follows:

§ 1627. Admissibility of Secondary Evidence Where the Record Evidence is Destroyed—Statute—“In all cases under the provisions of this act, and in all proceedings or actions now or hereafter instituted as to any estate, interest or right in, or any lien, or incumbrance upon any lots, pieces or parcels of land, when any party to such action or proceeding, or his agent or attorney, in his behalf, shall orally in court, or by affidavit, to be filed in such action or proceeding, testify and state under oath that the original of any deeds, conveyances or other written or record evidence, has been lost or destroyed, or not in the power of the party wishing to use it on the trial to produce the same, and the record thereof has been destroyed by fire or otherwise, the court shall receive all such evidence as may have a bearing on the case to establish the execution or contents of the deeds, conveyance, records or other writ-

32—Wyman v. Chicago, 254 Ill. 202.

33—Alvis v. Morrison, 63 Ill. 181.

ten evidence, so lost or destroyed: *Provided*, that the testimony of the parties themselves shall be received subject to all qualifications in respect of such testimony which are now provided by law; *and provided, further*, that any writings in the hands of any person or persons which may become admissible in evidence under the provisions of this section or of any other part of this Act shall be rejected and not be admitted in evidence unless the same appear upon its face without erasure, blemish, alteration, interlineation or interpolation in any material part, unless the same is explained to the satisfaction of the court, and to have been fairly and honestly made in the ordinary course of business; and that any person or persons making any such erasure, alteration, interlineation or interpolation, in any such writing, with the intent to change the same in any substantial matter, after the same has been once made as aforesaid, shall be guilty of the crime of forgery, and be punished accordingly; and that any and all persons who may be engaged in the business of making writings or written entries concerning or relating to lands and real estate, in any county in this state to which this Act applies, and of furnishing to persons applying therefor abstracts and copies of such writings or written entries as aforesaid, for fee, reward or compensation therefor, and shall not make the same truly and without alteration or interpolation, in any matter of substance, with the view and intent to alter or change the same in any material matter, or matter of substance, shall be guilty of the crime of forgery, and punished accordingly; and any and all such person or persons shall furnish said abstracts or copies as aforesaid, to the person or persons from time to time applying therefor, in the order of application and without unnecessary delay, and for a reasonable compensation to be allowed therefor, which in no case shall exceed the sum of one dollar and fifty cents for each and every conveyance, or other like change of title, shown by such abstract or copy; and any and all per-

sons so engaged, and whose business is hereby declared to stand on a like footing with that of common carriers, who shall refuse so to do, if tender or payment be made to him or them of the amount demanded for such abstract or copy, not exceeding the amount aforesaid, as soon as such amount is made known, or ascertained, or of a sum adequate to cover the amount before its ascertainment, shall be deemed guilty of extortion, and be punished by a fine of not less than \$100, and not exceeding \$1,000 therefor, upon indictment in any court having jurisdiction thereof, and shall also be liable to an action on the case, or other proper form of action or suit for any and all damages, loss or injury which any person or persons applying therefor may suffer or incur by reason of such failure to furnish such abstract or copy as aforesaid." 34

§ 1628. Admissibility of Abstract of Title Where the Original Records Are Destroyed—Statute—"Whenever, upon the trial of any suit or proceedings which is now or hereafter may be pending in any court in this state, any party to such proceeding, or his agent or his attorney, in his behalf, shall orally in court, or by affidavit to be filed in such cause, testify and state under oath that the originals of any deeds or other instrument in writing or records of any court relating to any lands, the title or any interest therein, being in controversy in such suit or proceeding are lost or destroyed, or not within the power of the party to produce the same, and the records thereof are destroyed by fire or otherwise, it shall be lawful for such party to offer, and the court shall receive, as evidence, any abstract of title, or letter press copy thereof, made in the ordinary course of business prior to such loss or destruction, and it shall also be lawful for any such party, and the court shall receive, as evidence, any copy, extract or minutes from the destroyed records, or from the originals thereof, which were, at the date of such destruction or loss.

in the possession of any persons then engaged in the business of making abstracts of title for others for hire. A sworn copy of any writing admissible under this section made by the person or persons having possession of writing, shall be admissible in evidence in like manner, and with like effect, as such writing, provided the party desiring to use such sworn copy as evidence shall have given the opposite party a reasonable opportunity to verify the corrections of such copy.”³⁵

§ 1629. Statute in Regard to Abstracts of Title to Receive a Fair and Liberal Interpretation—The condition of the property owner in Chicago after the great fire of October, 1871, was appalling, demanding legislative interference. A great evil had befallen them which this act was designated to remedy. It is emphatically a remedial act and, in accordance with a well established canon, it must receive a liberal construction and made to apply to all cases which, by a fair construction of its terms, it can be made to reach.³⁶

Since the date of the destruction of the public records by the great Chicago fire of 1871, a new generation has appeared upon the stage of life, and is now engaged in the transaction of business. And for aught that may appear it may well be assumed that no member of the firm of abstract makers, and no employee of such firms personally conversant with the circumstances under which the abstracts were made, now survives. If the statute is to receive a fair and liberal interpretation and such as will effectuate the intention of the legislature, it will not do to require, absolutely, that a witness must appear upon the stand who is able to testify, from his own actual knowledge and recollection, that the abstract sought to be availed of was made in the ordinary course of business, prior to the loss and destruction of the original deeds and instruments.

So where it appears that certain firms were engaged in

35—Sec. 29, Ch. 116, R. S.; Sec. 24, Burnt Record Act.

36—Smith v. Stevens, 82 Ill. 554.

the making of abstracts of title at the time the abstracts bear date, and a witness testifies that he was doing business in Chicago at that time as an abstract maker and that he was conversant with the business and the firms engaged in the same business, that he knew the handwriting in the bodies of the abstracts and the certificate and the signatures, such evidence is sufficient to show, *prima facie*, not only that the abstracts were made and delivered to some former owner or purchaser, but also that they were made and delivered by the makers thereof in their ordinary course of business as abstract makers.

And where it appears that the abstracts are dated before the destruction of the public records, it will be taken, in accordance with the general rule, as *prima facie* evidence, that they were made and delivered at the time they bear date.³⁷

§ 1630. Presumptions in Favor of the Delivery of Abstract—Prior to the amendment of the 24th section of the act in 1887, it contained a provision that the abstract of title to make it competent evidence must have been delivered to the owners or purchasers or other persons interested in the lands. In construing this portion of the section the Supreme Court has said: "The abstract being found in the hands of the grantee and owner of the title, among the deeds from two prior grantees it must be presumed that it was made and delivered to some former owner or purchaser, and handed down as an accompaniment of the muniments of title."³⁸

§ 1631. Strict Proof or the Execution of the Original Not Required—Under the early law of the state the courts had held that in order to admit certified copies of the record of an instrument it was necessary to make strict proof of the existence of the original, its loss, diligent search, and

37—Chicago & A. R. R. Co. v. Keegan, 152 Ill. 413; Cooney v. Booth Packing Co., 169 Ill. 370.

38—Richley v. Farrell, 69 Ill. 264; Chicago & A. R. R. Co. v. Keegan, 152 Ill. 413.

all the requirements of the common law for the admission of secondary evidence. In order to obviate this construction, relax the rule laid down by the courts and modify the strictness of the common law rule, the legislature passed an act in 1861, which with a slight change, became sections 36 and 37 of Chapter 30 of the Revised Statutes of 1874. The object of the act was to obviate the difficulties attending the introduction of secondary evidence of instruments which had been acknowledged or proved in such a way that the originals would be admitted without preliminary proof. It had nothing to do and was not intended to include in its provisions the miscellaneous, unacknowledged and unproved documents which might, under the provisions of section 31, be recorded and constitute notice, but were not made evidence in any way.³⁹

§ 1632. Preliminary Evidence to the Admission of Abstract or Minutes Essential—The requirement of the Burnt Record Act is, that the affidavit shall show that the original deeds and other instruments or the court records are lost or destroyed, and that the records thereof are destroyed by fire or otherwise, before an abstract can be received in evidence, and where the affidavit entirely omits the necessary fact of the destruction of the records of the instruments, an abstract of title should not be admitted.

And such omission cannot be supplied by an affidavit or another party that the document offered in evidence is a true and correct copy of an abstract made by a firm engaged in the business of making abstracts of title for others for hire, and that the records are destroyed by fire.⁴⁰

Under the provisions of section 24 of the Burnt Record Act an abstract of title is only admissible in evidence when the party wishing to use it or his agent or attorney shall state under oath that the originals of any deeds or other writings relating to the land are lost or destroyed or not within the power of the party to produce the same, and that

39—Winter v. Dibble, 251 Ill. 200.

40—Bauer v. Glos, 244 Ill. 627.

the records thereof have been destroyed. Until such preliminary proof is made an abstract of title is not admissible in evidence.⁴¹

An abstract made subsequent to the destruction of the records is not admissible in evidence.⁴²

§ 1633. Affidavit Made by Agent or Attorney Must Be Shown on Face—If the affidavit is made by the agent or attorney of the party this fact must be shown by the affidavit.

And it must also show that the original document was not lost or destroyed for the purpose of admitting secondary evidence of its contents.⁴³

§ 1634. Cross Examination of Affiant Not Permissible—Where the affidavit is made for the purpose of admitting in evidence a certified copy of a deed from the recorder's office, and such affidavit is positive in its terms and meets all the requirements of the statute, it is not permissible to cross examine such affiant in regard to the affidavit.⁴⁴

§ 1635. Statute in the Alternative, Party May Show Either Destruction or Want of Power to Produce—The affidavit, under section 35 of the conveyance act, need not show that the document, which is the basis of secondary evidence, of its existence and contents, is lost and also not in the power of the party wishing to use it. The statute is in the alternative, and a party may show either fact.⁴⁵

And where it is not shown that the document is not within the power of the party desiring to use it, the admission of secondary evidence of its contents is reversible error.⁴⁶

§ 1636. Abstract of Title Evidence, Under the Statute—Where the evidence shows that a deed and its record have both been destroyed, an abstract of the title to the land described therein shown to have been made in the ordinary

41—Walton v. Follensbee, 165 Ill. 480.

42—Glos v. Wheeler, 229 Ill. 272.

43—Bauer v. Glos, 244 Ill. 627.

44—Glos v. Garrett, 219 Ill. 208.

45—Culver v. Waters, 248 Ill. 163.

46—People v. Wiemers, 225 Ill. 17.

course of business by persons engaged in making abstracts of title for others for hire and delivered to the parties interested in the lands before the destruction of such records, is as to such deed, competent evidence under the 24th Section of the Burnt Record Act.⁴⁷

§ 1637. Extracts and Minutes of Record of Instruments Evidence—Where the loss and destruction of the original deeds and their records is shown a party is entitled to read in evidence extracts and minutes made from the original instruments on the day they were filed for record, by persons engaged in the business of making abstracts of title for others for hire, when such extracts and minutes are made in the ordinary course of business of such parties, and were in their possession at the time of the destruction of the records.⁴⁸

§ 1638. Grades or Degrees of Secondary Evidence—The position that there are no grades or degrees of secondary evidence, cannot be sustained either upon principle or authority; while it may be true that there are cases from which it might be inferred that such a rule was understood to prevail, but there is only one case where it appears to have been directly decided. (*Brown v. Woodman*, 25 Eng. Com. Law, 358.) The books, however, abound in cases expressly holding that the best accessible evidence must be produced, whether it be primary or secondary evidence. Proof of the contents of a lost paper ought to be the best the party has in his power to produce, and, at all events, to leave no doubt as to the substantial parts of the paper. Where proof is made out by parol, the witness should have seen and read the paper, and be able to speak pointedly and clearly as to its tenor and contents. But it is not necessary, in all cases, that the proof should show affirmatively that there is no counterpart or copy, in order to admit proof

47—*Russell v. Mandell*, 73 Ill. 136.

48—*Sternheim v. Brucky*, 149 Ill.

orally of the contents of the lost paper. There is no case where the reason of the rule, that the best attainable evidence should be procured, applies with more force than in the proof of the contents of lost papers, nor is there any case where parol proof is more unsatisfactory, or more likely to work injustice. Rarely, if ever, can a witness recollect the precise terms of a paper, or give more than his general impression of the substance from a perusal, when many important particulars may not have attracted his attention, and must, almost necessarily, have escaped his recollection.

The highest and most satisfactory degree of secondary evidence is an office copy, or a certified copy from the recorder's office, and when such certified transcript of the record of a deed is offered, our statute dispenses with strict proof of the loss of the original, and the party is only required to satisfy the court that it is not within his power to produce it.⁴⁹

§ 1639. Secondary Evidence of Secondary Evidence Inadmissible—It is well established that where a deed or other document is lost or destroyed, secondary evidence of its contents may be resorted to. But an abstract of title cannot be regarded as original evidence; it is nothing but secondary evidence, and to permit evidence to be given of the contents of a lost abstract, would be the introduction of secondary evidence of secondary evidence, and no rule of evidence is known under which such evidence is admissible.⁵⁰

§ 1640. Original Instrument and Record Both Destroyed, Evidence Governed by Burnt Record Act—The oral statement under oath in court or the affidavit to be filed, that the original instrument is lost, or not within the power of the party wishing to use it on the trial of the cause, and to the best of his knowledge the original deed was not in-

⁴⁹—*Mariner v. Saunders*, 10 Ill. (5 Gilm.) 113.

⁵⁰—*Thatcher v. Olmstead*, 110 Ill. 26.

tentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof, has no reference to the introduction of other secondary evidence where both the original instrument and the record thereof have both been destroyed, and are not within the power of the party to produce the same. That situation of affairs is covered by paragraph 29, chapter 116, which is commonly known as the Burnt Record Act, which was passed to meet the emergency caused by the great fire in Chicago in 1871.⁵¹

§ 1641. **Proof of Execution of Lost Deed**—The execution of a lost deed must be as strictly proved as if the deed itself were produced in court. If a subscribing witness resides out of the jurisdiction of the court he need not be produced, but if he is within the jurisdiction of the court he must be produced or his absence accounted for.⁵²

§ 1642. **Recollection of Witnesses as to Contents of Lost Instruments Admissible**—The recollection of witnesses as to the contents of lost or destroyed instruments is clearly admissible under the provisions of the Burnt Record Act. And no reason is perceived why their recollection might not be refreshed by notes taken by the witnesses, and known to be correct.⁵³

§ 1643. **General Rule as to the Sufficiency of Search to Be Made for Lost Deed**—From the nature of the subject there is some difficulty in laying down a general rule, defining the extent and vigilance of a search which a party must make, before the court may conclude that a paper is destroyed or lost, so as to admit secondary evidence of its contents. As a general rule, however, it may be said that where from the nature, ownership and objects of the paper, it has a proper and particular place of deposit, or where from the evidence it is shown to have been in a particular place or in particular hands, then that place must

51—Wyman v. Chicago, 254 Ill. 202.

53—Bush v. Stanley, 122 Ill. 406.

52—Mariner v. Saunders, 10 Ill. (5 Gilm.) 113.

be searched by the witness, proving the loss, or the person produced into whose hands it has been traced. The extent of the search to be made in such place or by such person, must depend in a great degree upon circumstances. Ordinarily, it is not sufficient that the paper is not found in its usual place of deposit, but all the papers in the office or place should be examined. But this need not always be done, where from the extent of the archives or office, it would be impracticable, and the order in which it is kept a more limited examination is equally satisfactory. In all cases the search must be made with the utmost good faith, and should be as thorough and vigilant, as, if the paper were not found, its benefit would be lost. On the whole the court must be satisfied that the paper is lost or destroyed, and cannot be found. It is true that the party need not search every possible place where it might be, for then the search might be interminable; but he must search every place where there is a reasonable probability that it may be found. Nor must the party produce every man upon the stand into whose hands mere rumor alone may have traced it, for if the inquiry is only suggested by hearsay, it may be answered by hearsay. If on the other hand, legal testimony shows it to have been in a particular place or if the natural and legal presumption is that it is in certain hands, then it must be proved by legal evidence that it is not there.

It may be that cases may be found which seem to tolerate a looser rule of practice; but so far from establishing a general rule, they serve to admonish against such a rule and of the danger of departing from well established legal rules, with the hope of meeting justice in particular cases.

In determining this question the court must act upon facts established by legal proof. But the general rule is too well established to admit of discussion, although, it may be said, that the court must be vested with a certain amount of discretion, depending upon the circumstances of each particular case. If there is the least suspicion of fraud or design

to be gathered from any part of the testimony, the court cannot be too strict in the testimony required.⁵⁴

§ 1644. Sufficiency of the Evidence of Want of Power to Produce Deed—What shall be sufficient evidence that the original deed is not within the party's power must necessarily depend upon the circumstances of each particular case, and is, in some measure, addressed to the discretion of the court trying the case. If the evidence shows that reasonable efforts have been made to produce the original, or that such efforts would probably be unavailing, it is all that the statute requires.

Under the statute, it is not necessary that the party wishing to use a certified copy of a deed duly acknowledged and recorded should himself make affidavit of the loss of the original or that it is not within his power to produce it. But any evidence which satisfied the mind of the court that the deed is not within the power of the party is all that is required. The same evidence of the loss of the original is not requisite to let in the evidence of its contents by a certified copy, as when the contents is to be supplied by oral testimony.

The grantee in a deed is presumed to have possession of it, and yet when a party makes affidavit that he has not possession of it and does not know where it is, and that it is out of his power to produce it, connected with the proof that the grantee, when called upon to produce the original, answered that he had not had it for a long time, and did not know where it was, this was held to be sufficient to admit a certified copy in evidence without calling the grantee as a witness, although he lived in the same town.⁵⁵

Where a vendor testifies that he executed a contract and delivered it to the vendee who placed it upon record and that it is not in his possession, such evidence is not suffi-

54—*Mariner v. Saunders*, 10 Ill. (5 Gilm.) 113.

55—*Newsom v. Luster*, 13 Ill. 176.

cient to admit in evidence the record or a certified copy thereof provided the offer is specifically objected to.⁵⁶

The preliminary proof must show that the documents are not within the power of the party to produce the same.

Where a party to the suit testifies that he does not have a certain deed, that it is not in his hands and he has never seen it, and has no control over it, and that it is not destroyed so far as he knew, and that it might be in the hands of his brother in Burlington, Iowa, and he expects that it could be found, is not sufficient evidence to admit in evidence to lay the foundation for the admission of the record of the deed under section 36 of the Conveyance Act.⁵⁷

Section 36 of the Conveyance Act and section 29 of the Burnt Record Act have substantially the same meaning and where the affidavit states that the original is not within the power of the party it is equivalent to saying that it is not within his power to produce the same on the trial.⁵⁸

§ 1645. Instrument Not Intentionally Destroyed—The 36th Section of the Conveyance Act requires the affidavit to contain a statement that to the best of the affiant's knowledge said original deed was not intentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof in place of the original, and where such statement is wanting it is improper to admit a certified copy of the record of the original deed.⁵⁹

§ 1646. Objections to Evidence to Be Specific—An objection to the sufficiency of the evidence to lay the foundation for the admission of secondary evidence of the contents of a deed claimed to have been destroyed in fraud of the rights of the grantee, must be made in the trial court, it cannot be urged for the first time in the court of appeal.⁶⁰

A general objection to the admission of evidence, waives

56—Baltimore & S. W. R. R. Co. v. Brubaker, 217 Ill. 462.

59—Bauer v. Glos, 244 Ill. 627.

57—Scott v. Bassett, 174 Ill. 390.

60—Gillespie v. Gillespie, 159 Ill.

84.

58—Wyman v. Chicago, 254 Ill. 202.

the specific objection that the evidence offered is not sufficient to authorize the admission of secondary evidence of the contents of a lost deed.⁶¹

§ 1647. Qualification of Party Making Affidavit—The affidavit which a party is allowed to make by the Conveyance Act, is merely to dispense with the production of the original instrument, and to make the record competent evidence. Such a party is not disqualified to make such an affidavit because he is disqualified to testify in the case as a witness generally.⁶²

§ 1648. Single Affidavit by Several Parties Covering Several Instruments Admissible—Where an affidavit is made by several plaintiffs, stating that they desire to use copies of certain deeds, or the records of such deeds in evidence as a part of their chain of title, and each deed is particularly described, and that the affiants each for himself, state that they do not either of them have in their possession or control any of the original deeds aforesaid, and that it is not within the power of either of them to produce the same, or either of them, on the trial of the case, and that to the best of their several and respective knowledge all of the said original deeds are not in the custody, control or power of the plaintiffs to produce them or any of them; that the same have not been intentionally destroyed for the purpose of introducing a copy or copies of the same in evidence in place of the original deeds, and that it is not within the power of the affiants, or either of them, to produce the originals of either of said deeds, such an affidavit is sufficient to authorize the admission in evidence the record or a certified copy thereof, of such deeds. It is not necessary that an affidavit should be made separately as to each deed, under the provisions of section 36 of the Conveyance Act.⁶³

§ 1649. Place of Making and Officers Who May Take Affidavits in Regard to Lost Deeds—Statute—“All affidavits required to be made and produced under the fore-

61—Tucker v. Duncan, 224 Ill. 453.

63—Scott v. Bassett, 194 Ill. 602;

62—Scott v. Bassett, 194 Ill. 603.

Ellison v. Glos, 248 Ill. 275.

going section, may be made in any county in this state, before any officer authorized by the laws of this state to administer oaths and affirmations, and may also be made out of this state, before any judge of a court of record, justice of the peace, clerk of a court of record, notary public, or commissioner appointed under the laws of the State of Illinois to take acknowledgment of deeds and administer oaths and affirmations, and certified to by said officer, under his seal of office, if said officer have an official seal; but if taken and certified by an officer who does not require or use an official seal, the certificate of the proper clerk or other officer of the official character of the person certifying to such oath or affirmation shall also be produced with such affidavit and certificate.”⁶⁴

§ 1650. United States Gift of Canal Lands to the State—Statute—“There be, and hereby is, granted to the State of Illinois, for the purpose of aiding said state in opening a canal to unite the waters of the Illinois River with those of Lake Michigan, a quantity of land equal to one-half of five sections in width, on each side of said canal, and reserving each alternate section to the United States, to be selected by the Commissioner of the Land Office, under the direction of the President of the United States, from one end of said canal to the other; and the said land shall be subject to the disposal of the Legislature of the said state, for the purpose aforesaid, and for no other: *Provided*, that the said canal, when completed, shall be, and forever remain, a public highway for the use of the Government of the United States, or persons in their service, passing through the same; *Provided*, that said canal shall be commenced within five years, and completed in twenty years, or the State shall be bound to pay to the United States the amount of any lands previously sold, and that the title to purchasers under the state shall be valid.”⁶⁵

⁶⁴—Sec. 37, Ch. 30, R. S.

⁶⁵—Sec. 41, Ch. 19, R. S.; 4 U. S.

Stat. at Large, p. 234.

§ 1651. Selection of Lands and Report to Secretary of the Treasury—Statute—“So soon as the route of the said canal shall be located and agreed on by the state, it shall be the duty of the Governor thereof, or such other person or persons as may have been, or shall hereafter be, authorized to superintend the construction of said canal, to examine and ascertain the particular sections to which the state shall be entitled, under the provisions of this Act, and report the same to the Secretary of the Treasury of the United States.”⁶⁶

§ 1652. Power of the State to Convey—Statute—“The said state, under the authority of the legislature thereof, after the selection shall have been so made, shall have power to sell and convey the whole, or any part of said land, and to give a title in fee simple therefor, to whomsoever shall purchase the whole or any part thereof.”⁶⁷

§ 1653. Act of Congress of 1822—So much of the Act of Congress of March 30, 1822, as refers to the question of the 90-foot strip on each side of the canal is as follows: “That the State of Illinois be and is hereby authorized to survey and work through the public lands of the United States, the route of the canal connecting the Illinois River with the southern bend of Lake Michigan; and 90 feet of land on each side of said canal shall be forever reserved from any sale to be made by the United States, except in cases hereinafter provided for, and the use thereof forever shall be and the same is hereby vested in the state for a canal, and for no other purpose whatever; on condition, however, that if said state does not survey and direct, by law, said canal to be opened, and return a complete map thereof to the treasury department, within three years from and after the passage of this act; or, if the said canal be not completed, suitably for navigation, within twelve years thereafter; or, if said ground shall ever cease

⁶⁶—Sec. 42, Ch. 19, R. S.; 4 U. S. Stat. at Large, 234.

⁶⁷—Sec. 43, Ch. 19, R. S.; 4 U. S. Stat. at Large, 234.

to be occupied by and used for a canal suitable for navigation, the reservation and grant hereby made shall be void and of none effect."

It is necessary for parties claiming any right or benefit under the provisions of this act to show that the conditions prescribed by the statute were complied with because it is made indispensable by the Act of Congress to the vesting of the rights conferred in the state.

Afterwards, Congress passed the Act of March 2, 1827, hereinafter mentioned. This act does not purport to be an amendment to the Act of 1822, nor does it, by inference, refer to it. These acts constitute distinct and independent offers, by the government of the United States, of aid to the state in the construction of the canal, and the latter one having been accepted, without reference to the terms and conditions of the former, the state is only entitled to the grant which it conveys.⁶⁸

§ 1654. Certified Copy of Lands Granted to Illinois for Canal Purposes Admissible in Evidence—The government records furnish the proper evidence of what lands were sold, and what reservations were made for canal or other purposes.⁶⁹

A certified copy of a grant from the United States to the State of Illinois under the Act of Congress of 1827, granting lands to the state for the purpose of aiding in the construction of the Illinois and Michigan Canal, duly certified by the recorder of the general land office, under his seal of office, is admissible in evidence under the common law, and the fact that it is not certified by any register or receiver of any land office as provided by section 20 of chapter 51 of the Revised Statutes does not render it inadmissible.⁷⁰

§ 1655. Deeds by Trustees of Illinois and Michigan Canal—Statute—"All deeds, title papers, agreements and con-

68—Chicago v. McGraw, 75 Ill. 566. 202; Seely v. Wells, 53 Ill. 120; Wil-

69—Chicago v. McGraw, 75 Ill. 566. cox v. Jackson, 109 Ill. 261.

70—Wyman v. Chicago, 254 Ill.

tracts affecting the title to real estate in this state, heretofore executed by the board of trustees of the Illinois and Michigan Canal, under the seal of said board, or which may have been heretofore or may hereafter be executed by the canal commissioners, under their seal of office, shall be admitted to record, and the same or a certified transcript of the record shall be admitted in evidence in all courts without acknowledgment of further proof.”⁷¹

§ 1656. Copies of Books and Entries of Sales of Canal Lands—Statute—“Copies of the books and entries of the sales or conveyances of any lands or lots that have been sold or conveyed by the trustees of the Illinois and Michigan Canal, or have been or may be sold or conveyed by the canal commissioners under any law of this state, certified to be true and correct copies of such books or entries, by the secretary of the canal commissioners, under the official seal, shall be prima facie evidence of the facts stated in such books or entries, and of the title in the party to whom such lands or lots appear by such certificate copies to have been sold or conveyed, his heirs or assigns.”⁷²

§ 1657. Certificates of United States Register and Receiver Evidence—Statute—“The official certificate of any register or receiver of any land office of the United States, to any fact or matter on record in his office, shall be received in evidence in any court in this state, and shall be competent to prove the fact so certified. The certificate of any register, of the entry or purchase of any tract of land within his district, shall be deemed and taken to be evidence of the title of the party who made such entry or purchase, or his heirs or assigns, and shall enable such party, his heirs or assigns to recover or protect the possession of the land described in such certificate in any action of ejectment or forcible entry and detainer, unless a better or paramount

⁷¹—Sec. 10, Ch. 19, R. S.

⁷²—Sec. 11, Ch. 19, R. S.; Chicago
& A. R. R. Co. v. Keegan, 152 Ill. 413.

title be exhibited for the same. And the signature of such register or receiver may be proved by a certificate of the Secretary of State, under his seal, that such signature is genuine."⁷³

§ 1658. Certified Copies of Records of Land Office Evidence—By the acts of Congress for the sale of public lands the public officers who are charged with their execution are required to make and keep public records of their surveys, sales and conveyances; so copies of such public records certified as such under the seal of office, are admissible in evidence, including certified copies of patents.⁷⁴

An exemplification of any record or paper of record in the land office is evidence of equal dignity with the original, and may be read in evidence wherever the original would be admitted, without any preliminary proof whatever.⁷⁵

§ 1659. Meaning of the Words "Better, Legal and Paramount Title" Defined—The words "better, legal, paramount title," used in the act of the legislature, making the certificates of the Land Office evidence, do not mean the title of the United States, but they refer to cases where the United States did not have the title at the time of the sale and the issuing of the certificate.⁷⁶

The certificate of the Register of the Land Office to any fact on the record in his office, is competent evidence of such fact, and is made so by the statute.⁷⁷

And it is error to exclude such certificate.⁷⁸

§ 1660. Distinction Between Register's Certificate and Receiver's Certificate—The court seems to draw a distinction between a register's certificate and a receiver's certificate. It is the register to whom is committed the pos-

73—Sec. 20, Ch. 51, R. S.

74—Lane v. Bommelmann, 17 Ill.

95.

75—Lee v. Getty, 26 Ill. 76.

76—McConnell v. Wilcox, 2 Ill. (I Scam.) 344.

77—Ross v. Reddick, 2 Ill. (I Scam.) 73; Turney v. Goodman, 2 Ill. (I Scam.) 184; Russell v. Whiteside, 5 Ill. (4 Scam.) 7.

78—Whiteside v. Divers, 5 Ill. (4 Scam.) 336.

session of the plats, tract books and registry of certificates, and other record evidence of the sale of the public lands in his district, and the register is the only officer who could certify, in truth, that a certain party entered the lands in the land office. The receiver not having the possession of these records, they do not appear "as facts or matter of record in his office," and he cannot truthfully certify as to the entry of the land.

He may certify that the United States has received a certain sum of money in payment of certain lands, if the same so appears from the record in his office, but he must certify that such is the fact, and not merely that the United States has received a certain sum of money. The court seems to draw a distinction between certifying to a fact of record and a simple receipt acknowledging the receipt of the money.⁷⁹

§ 1661. Receiver's Certificate Not Evidence in United States Courts—Although the statutes of Illinois may make a Receiver's receipt evidence of title in actions in that state, yet it is not such in an action at law, as ejectment, in a court of the United States.⁸⁰

§ 1662. Patent the Best Evidence of the Entry or Purchase of Land—Statute—"A patent for land shall be deemed and considered a better and paramount title to the patentee, his heirs or assigns, than the official certificate of any register of a land office of the United States, of the entry or purchase of the same land."⁸¹

Formerly it was held that the certificate of a Register of a Land Office, of the purchase of a portion of the public lands from the United States under the early statutes of this state, was of as high a character in point of evidence

79—*Roper v. Clabaugh*, 4 Ill. (3 Scam.) 166.

80—*Langdon v. Sherwood*, 124 U. S. 74; *Redfield v. Parks*, 132 U. S. 239.

81—Sec. 21, Ch. 51, R. S.; *Laws of 1839*, p. 196.

as a patent, and was to be governed by the same rules of interpretation.⁸²

But this provision of the statute was modified by the laws of 1839.

A patent affords a legal presumption that it was properly issued, if it is regular on its face, and upon which it is safe for subsequent purchasers to rely.⁸³

In an action of ejectment a patent is conclusive evidence of title, higher and better than a register's certificate of a prior purchase. In equity, however, a certificate of purchase by the register will prevail as against a patent, if the right on which it is based is prior in point of time to that on which the patent is founded.⁸⁴

In equity a junior patent or register's certificate of purchase of a tract of land, will prevail over the elder one, if the right on which it is based is prior in point of time to that on which the elder one is founded.⁸⁵

§ 1663. Patent Once Regularly Issued Valid and Not Subject to Cancellation—When a patent is filled out, countersigned, sealed, and recorded in the general land office, the title to the land vests in the party named in the patent, without a formal delivery of the instrument; and any effort by an officer of the government to cancel a patent which transfers the title to the patentee and reinvest the title in the government, is absolutely void, and cannot affect the rights of anyone.⁸⁶

§ 1664. Recording Patents—Certified Copies Evidence—Statute—“In all cases where any lands or lots have been or may be sold by this state or by the officers thereof, under the authority of any law of this state, whereof the patent shall be issued by the Governor, under the seal of this state, and in case said patent has been or shall purport to be recorded in the recorder's office of the county where

82—Gillipot v. Manlove, 2 Ill. (I Scam.) 156.

83—Moore v. Hunter, 6 Ill. (I Gilh.) 317.

84—Wiggins v. Lusk, 12 Ill. 132.

85—Isaacs v. Steel, 4 Ill. (3 Scam.)

97.

86—Gilmore v. Sapp, 100 Ill. 297.

the lands or lots are situated, and said patent shall be lost, or out of the power of the party desiring to use the same to produce in evidence, a copy of the record of said patent, certified by the recorder of said county, may be read in evidence in place of the original patent; which copy certified as aforesaid, shall be prima facie evidence of the issuing of said patent; and of the contents thereof. The provisions of this section shall apply to deeds executed by the trustees of the Illinois and Michigan Canal, and to patents issued or granted by the United States''⁸⁷

§ 1665. Certified Copies of Books and Entries of Sales by State—Patent Best Evidence—Statute—“Copies of the books and entries of the sale of all lands or lots heretofore or that hereafter may be sold by this state or any of the officers thereof under any law of this state, certified to be true and correct copies of such books and entries by the proper person or officer in whose custody said books and entries may properly be, shall be prima facie evidence of the facts stated in said books and entries. The certificate of such officer of the purchase of or issuing of a patent of any tract of land sold by this state or any agent of the same shall be deemed and taken as evidence of the title in the party certified to have made such purchase or obtained such patent, his heirs or assigns, unless a better and paramount title is exhibited for the same. The patent for the land shall be deemed a better and paramount title in the patentee, his heirs or assigns, than such certificate.”⁸⁸

§ 1666. Evidence of the Sale of Swamp and Overflowed Lands—Statute—“And when any swamp and overflowed lands and lots heretofore have been or hereafter may be sold under any law of this state by any proper person or officer of the county in which said lands lie, copies of the books and entries of the sales of such swamp and overflowed lands and lots certified to be true and correct copies of such books and entries by the proper person or officer

87—Sec. 22, Ch. 51, R. S.

88—Sec. 23, Ch. 51, R. S.

in whose custody such books and entries may properly be, shall be prima facie evidence of the facts stated in such books and entries. The certificate of such officer of the sale or entry of any tract or tracts of such swamp and overflowed lands or lots and of the execution of a deed for the same giving the date of such sale or entry, the date of the execution of the deed, the name of the purchaser and the description of the land, under the seal of his office, may, if the original deed be lost, or it be out of the power of the party wishing to use the same to produce it in evidence, and such original deed has never been recorded, be read in evidence in the place of said original deed and shall be prima facie evidence of the execution and delivery of a proper deed for such land, and shall be deemed and taken as evidence of the title in the person certified to have made such entry or purchase his heirs and assigns, until a better and paramount title is exhibited for the same.”⁸⁹

§ 1667. Books and Entries Lost or Destroyed, Certificate of Auditor of Public Accounts Admissible—Statute—“And whenever it shall appear that the original deed upon any entry or sale of such swamp and overflowed lands is lost or not in the power of the party wishing to use the same to produce in evidence, and the same had never been recorded as aforesaid and the books and original entries of sale of such swamp and overflowed lands or lots have also been lost or destroyed, and the clerk of the county court or other proper officer shall have made return of such sales and entries to the Auditor of Public Accounts according to law, a certified copy of such return by the Auditor under his seal of office, may be used in evidence with like force and effect as hereinbefore provided: Provided the party applying to the Auditor for such certificate shall pay a fee of one dollar for each certificate.”⁹⁰

§ 1668. United States Patent—Record or Copy Evidence on Proof of Loss—Statute—“Whenever upon the trial of

89—Sec. 23, Ch. 51, R. S.

90—Sec. 23, Ch. 51, R. S.

any cause in law or equity in this state, any party to said cause, or his agent or attorney in his behalf, shall by affidavit to be filed in said cause, testify and state under oath that the required United States patent conveying or concerning the title to the lands, tenements and hereditaments in question in such suit is lost, or not in the power of the party wishing to use it on such trial of any such cause, and to the best of his knowledge the said patent was not intentionally destroyed, or lost, or in any manner disposed of for the purpose of introducing a copy thereof in place of the original, and if the original has been recorded in the recorder's office of the county wherein such lands are situated, then the record thereof, or a copy duly certified by the recorder in whose office the same may have been or may hereafter be recorded, may be read in evidence in any court in this state with like effect as though the original patent was produced and read in evidence." 91

§ 1669. **Cure of Defects in Acknowledgments—Statute—**
“That all deeds, mortgages and other instruments in writing relating to or affecting any lands, tenements or hereditaments situated within this State, which have been acknowledged or proved before any commissioner of this state in any of the states or territories of the United States or in the District of Columbia, and which have been or may be recorded in the county where such lands, tenements or hereditaments do actually lie, shall be adjudged and treated by all courts as legally executed, acknowledged and recorded, notwithstanding no city or town wherein such acknowledgment was taken is specified or mentioned in the certificate of such commissioner, and notwithstanding no certificate under the hand and official seal of the Secretary of State be subjoined or affixed to the certificate of such commissioner that such commissioner was, at the time of taking such proof or acknowledgment, duly authorized to take the same, and that the Secretary is acquainted with the

91.—Laws of Ill. 1879, p. 81.

handwriting of such commissioner or has compared the signature of such certificate with the signature of such commissioner deposited in his office and that he verily believes the signature and the impression of the seal of the said certificate to be genuine.”⁹²

§ 1670. Statute Curing Defects in Acknowledgments Retroactive—The act of 1819 did not empower notaries public to take acknowledgments of deeds, but in 1827 the legislature passed an act concerning the conveyance of real estate, and in 1829 the act of 1827 was amended, by which notaries public were included among the officers who might take acknowledgments of deeds. The act of 1829 was retroactive by its terms and provided that “All deeds and conveyances which have been or may be acknowledged or proved in the manner provided in this section, shall be deemed as good and valid in law as if the same had been acknowledged or proved in the manner prescribed in the 9th section of the act to which this is an amendment.”

The object of this statute was to cure defects in acknowledgments. There is no doubt but that a large number of acknowledgments of deeds had been taken before officers not authorized by the statute to act. To remedy the evil and cure the defects, this curative statute was passed. Similar statutes were passed in 1845, and in 1847, and these curative statutes should receive liberal construction.

And when the mischief to be remedied and the manifest object of these statutes are kept in view, there can be no doubt but that the defective acknowledgments were validated by those acts. So it was held that an acknowledgment taken before a notary public in 1820, was validated by these acts and a mortgage to which it was attached should have been admitted in evidence by the trial court.⁹³

§ 1671. Acknowledgments to Be Taken Before Disinterested Officers—An acknowledgment of an instrument in writing, when required by law, should be made before an

92—*Laws of Ill.* 1895, p. 129.

93—*Logan v. Williams*, 76 Ill. 175.

officer wholly disinterested. An officer should not be permitted to perform either a ministerial or judicial act in his own behalf. To allow this might lead to grievous wrong, and no officer should be subjected to such temptation. So a mortgage acknowledged before one of the mortgagors was held to be improperly acknowledged.⁹⁴

It was held that a mortgage given to a building and loan association and acknowledged before a notary public, who was a stockholder and officer of the association, was not a disinterested party, and the acknowledgment was held to be invalid.⁹⁵

§ 1672. Certified Copies of Defectively Acknowledged Deed Before Commissioners Admissible in Evidence—Statute—"Certified copies of the records properly authenticated, shall be received in all courts and places as evidence of the due execution and recording of every such deed, mortgage or other instrument in favor of the person or persons who claim or desire to deduce title under such deed; mortgage or other instrument: Provided, however, that the person or persons so offering in evidence any such deed, mortgage or other instrument or certified copies thereof, shall exhibit with the original or certified copy of the same from the records thereof duly authenticated, a certificate of the Secretary of State of this state under his hand and official seal that the commissioner before whom the same purports to have been acknowledged was, on the day of the date of such acknowledgment, a commissioner for this state in the state or territory such deed, mortgage or other instrument was acknowledged." ⁹⁶

§ 1673. Defective Acknowledgment and Execution of Deeds Legalized—A number of attempts have been made by the legislature to legalize defective acknowledgment

⁹⁴—*Hammers v. Dole*, 61 Ill. 307;
West v. Krebaum, 88 Ill. 263.

⁹⁶—*Laws of Ill.* 1895, p. 129.

⁹⁵—*Ogden B. & L. Assn. v. Mensch*,
196 Ill. 554.

and execution of deeds. Doubts have been expressed as to the constitutionality of such statutes; at least so far as vested rights are concerned.

At one time it was the custom in the execution of mortgages securing the payment of loans made by building and loan associations that the mortgage was acknowledged before an officer or stockholder of the association. In the case of the Ogden Building and Loan Assn. v. Mensch, 196 Ill. 554, it was held that such acknowledgments were illegal and of no effect.

In 1903, the legislature passed an act which provided "That all deeds, mortgages or other instruments in writing, relating or affecting any real estate situated in this state, wherein a corporation may be the grantor, grantee, or mortgagee, which have been acknowledged or proved before any notary public, justice of the peace or other officer authorized by the statutes of this state to take acknowledgments of such instruments of writing, when so acknowledged or proved, in conformity with the statutes of this state, shall be adjudged and treated by all the courts of this state, as legally executed and acknowledged or proven, notwithstanding such acknowledgment or proof of the execution thereof were taken before a notary public, justice of the peace or such other officer who was, or may have been at the time of such acknowledgment, a stockholder or officer of such corporation; and all such acknowledgments or proofs of such deeds, mortgages or other instruments in writing heretofore taken before such notaries public or other officers, who were at the time of such execution, acknowledgment or proof, a stockholder of such corporation, are hereby legalized." ⁹⁷

In the case of Steger v. Traveling Men's Building and Loan Association, 208 Ill. 236, in commenting on this statute the Supreme Court says: "There is language in the

97—*Laws of Ill. 1903*, p. 120.

act which, taken alone, might be interpreted as a mandate of the legislature to decide cases arising prior to the enactment according to the legislative will. The legislature cannot exercise judicial power either directly or through a legislative command, but the substance of this act is, that acknowledgments taken before an officer or stockholder of a corporation shall be legal and valid and that acknowledgments so taken before the passage of the act are legalized. This is not the exercise of judicial power, since it does not purport to settle suits or controversies, but only gives effect to acknowledgments in a matter under legislative control. * * * The legislature may ratify and confirm any act which it might lawfully have authorized in the first instance, where the defect arises out of the neglect of some legal formality, and the curative act interferes with no vested rights."

The opinion then proceeds to the effect in substance that the act cannot have the effect to deprive a party of his vested rights, and transfer them to another party, which would constitute the taking of property without due process of law.

So where a building association, prior to the passage of the curative act of 1903, had no lien upon the homestead estate of one of its borrowers, by reason that the mortgage securing the loan was acknowledged before one of its officers as a notary public, it was held that the mortgagor was thereafter still vested with a perfect and unincumbered title to the estate of homestead, which might be transferred or mortgages to a third party, and when so transferred the building association would have no rights or equities which would overcome the legal and equitable rights of such assignee of the original mortgagor.

All deeds or instruments in writing for the alienation of the homestead are invalid unless the homestead is released or conveyed in the manner provided by the statute, and if a mortgage contains no release of the homestead a court

of equity cannot make the mortgage effectual against such estate.⁹⁸

§ 1674. Instruments Without Seal, Executed Without State, Validated—Statute—“That all conveyances, writings or other instruments, whether a deed, mortgage, trust deed, lease, power of attorney, will or testament, bond, contract, agreement, obligation or other instrument of whatever kind, nature or character affecting or relating to the title to real or personal property within this state, or of any power, duty, right or trust thereof or therein, and also all instruments of writing of whatever nature, kind or character enforceable in this state that may have been heretofore or shall hereafter be executed without this state, by any party thereto, whether a resident of this state or not, to which a seal or scroll is not affixed, and where the usage or law of the state, district, territory, colony, republic, kingdom, empire, dominion, dependency or other place where such instrument is executed, in force at the time, dispenses or does not require a seal or scroll to the signature of a party so executing the conveyance, instrument or writing, for its validity as such, are hereby validated, and shall be given the same force and effect in law and equity as if a seal or scroll had been duly affixed to the signature thereto.”⁹⁹

§ 1675. Evidence of the Necessity of Seal to Document by Laws or Usage of Country Where Executed Dispensed With—Statute—“That the certificate of the Secretary of State, under his seal of office, or that of any court of record, certified under the seal of the court, or that of any judge of any court of record (his official character being certified to) of the country or other place, outside of this state, where such conveyance, writing or other instrument shall have been executed, to the purport or effect that ac-

⁹⁸—*Steger v. Traveling Men's B. & L. Assn.*, 208 Ill. 236; *Fugman v. Jiri Washington B. & L. Assn.*, 209 Ill. 176.

⁹⁹—*Laws of Ill. 1909*, p. 145.

according to the usage or law of the land in force at the time (as the case may be), a seal or scroll to the signature of a party so executing the same, was dispensed with and not required for its validity, shall be deemed and taken as prima facie evidence thereof: Provided, that any other legal mode of proving that the seal or scroll to the signature was not at the time there, by the usage or law, dispensed with or not required, may be resorted to in any place or court of this state, where the question may arise."¹

1—*Laws of Ill.* 1909, p. 145.

CHAPTER XVI

PLATTING, RECORDING AND VACATING SUBDIVISIONS AND DEDICATION OF LAND

- § 1700. Introduction.
- § 1701. Power of Legislature Over Property of Municipalities.
- § 1702. Subdividing and Platting Lands—Statute.
- § 1703. Owner to Subdivide.
- § 1704. Ratification by Owner.
- § 1705. Surveying and Platting.
- § 1706. Certificate of Surveyor—Acknowledgment by Owner—Statute.
- § 1707. Surveyor Incompetent to Impeach His Certificate.
- § 1708. Acknowledgment by Owner.
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- § 1724. Rights of Public to Proper Description of Lands.
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- § 1726. Effect of Plat or Map Made in Court Proceeding—Statute.
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- § 1728. Fee of Bed of Navigable Rivers.
- § 1729. Method of Dedication.
- § 1730. Uses and Purposes for Which Land May Be Dedicated—Private Ways.
- § 1731. Common Law Dedication of Land.
- § 1732. Common Law Dedication as Evidence of Dedication.

- § 1733. Unsubdivided Block in Plat—Object and Purpose to Be Shown.
- § 1734. Acceptance by Public Essential to Completed Dedication.
- § 1735. Offer of Owner to Dedicate Property to Public Use Evidenced by Filing Plat.
- § 1736. Offer to Dedicate Essential.
- § 1737. An Acceptance of a Part of the Property Dedicated.
- § 1738. Description of the Property Dedicated for Public Use.
- § 1739. Revocation of Offer to Dedicate Land for Public Purposes.
- § 1740. Evidence of Revocation.
- § 1741. Distinction Between Statutory and Common Law Dedication.
- § 1742. Distinction Between Plats Made by State or Public Officers and Private Persons—Fee in Streets.
- § 1742. Fee in Streets in Original Town of Chicago.
- § 1742. Fee in Streets in Fractional Section 15 Addition to Chicago.
- § 1742. Fee in Streets in Fort Dearborn Addition to Chicago.
- § 1742. Fee in Streets in Town of La Salle.
- § 1743. Dedication Includes the Surface and All Above and Beneath.
- § 1744. Dedication and Acceptance a Question of Fact.
- § 1745. Evidence of Dedication and Acceptance Should Be Certain.
- § 1746. Dedication by Prescription.
- § 1747. Presumptive Right Not Conclusive.
- § 1748. Equitable Estoppel Against the Public.
- § 1749. Vacation of Entire Plat by Owner—Statute.
- § 1750. Vacation of Part of Plat—Statute.
- § 1751. Vacating Streets and Highways by Public Authority—Statute.
- § 1752. General Rule in Regard to Vacating Streets and Highways.
- § 1753. Cancelling Plat of Record—Statute.
- § 1754. Plats of Highways Made and Recorded—Statute.
- § 1755. Prosecuting Offenders Against Statute—Statute.
- § 1756. Plats to Be Approved by Corporate Authorities—Statute.
- § 1757. Abandonment of Public Property by Public Authorities.
- § 1758. Various Views of Rights of Adjoining Owners.
- § 1759. Rights of Adjoining Owners Under Statutory Dedication.
- § 1760. Effect of Vacation of Public Grounds by Municipalities.
- § 1761. Constitutionality of Act Extending Rights of Adjoining Owners.
- § 1762. Rights of Adjoining Owners Under Common Law Dedications.
- § 1763. Rights of Adjoining Owners to Keep Streets Open.
- § 1764. Rights of Adjoining Owners to Light and Air.

§ 1700. **Introduction**—The statutes in regard to platting, subdividing, recording of plats and the vacation thereof, and of vacating and abandoning the use of public streets and grounds, are scattered through various chapters of the revised statutes, and an attempt is here made to collate these various sections of the statutes, together with the de-

cisions of the courts affecting them, and arrange them in consecutive form so as to bring the entire subject clearly before the reader.

It is an important subject affecting the title to real estate and deserving careful consideration.

Before proceeding, however, to consider the statutes and decisions on this subject it would be well to call the attention of the reader in the first place to the plenary

§ 1701. Power of Legislature Over Property of Municipalities—Municipal corporations, being purely of legislative creation for local government, the legislature may control and dispose of their property as shall appear for the best interest of the public. The legislature may create, annul and change and dispose of their property, subject only to the constitutional provision relating to local or special legislation.¹

§ 1702. Subdividing and Platting Land—Statute—“Whenever the (1) owner of land shall wish to subdivide the same into two or more plats for the purpose of laying out a town, or making any addition to any city, village or town, or of re-subdividing any lots or blocks therein, he shall cause the same to be (2) surveyed and a plat thereof made by the county surveyor, or some other competent surveyor, which (3) plat shall particularly describe and set forth all the streets, alleys, commons or public grounds, and all the in and out lots or fractional lots or blocks within, adjoining or adjacent to the land so divided, (4) giving the names, widths, courses and extent of all such streets and alleys, and (5) numbering all lots and blocks by progressive numbers, giving their precise length and width. (6) Reference shall also be made to some known and permanent monument from which future surveys may be made, or, if no such monument shall exist within convenient distance, the surveyor shall, at the time of making his survey, plant,

¹—Ward v. Field Museum, 241 Ill.
496.

and fix in such manner that the same shall not be moved by frost, at the corner of some public ground, or, if there be none, then at the corner of some lot or block most convenient for reference, a good and sufficient (7) stone to be furnished by the person for whom the survey is made, and (8) designate upon the plat the point where the same may be found.”²

Subdivisions so made are usually called “Statutory Subdivisions.” It will be seen from the foregoing that there are several essentials to a good statutory subdivision. It must be made by the owner; surveyed and platted by a surveyor; particularly describing and set forth all streets, alleys and public grounds; give the names, widths, courses and extent of all streets and alleys; numbering all lots and blocks by progressive numbers; giving their precise length and width; reference to be made to some known and permanent monument to aid future surveys; if no such monument exists to fix a good and sufficient stone to be most convenient for reference and designate upon the plat the point where the stone or monument may be found.

§ 1703. Owner to Subdivide—It is essential to a good statutory subdivision of lands that it be made by the owner; no other person has any legal authority to make such a subdivision and a subdivision made by one who is not the owner is not a valid subdivision according to the statute.³

So where the legal title is in infants or other incompetents any attempt on the part of the guardian or conservator to plat or dedicate land will be of no avail, unless afterwards ratified by the owner after the disability is removed.⁴

§ 1704. Ratification by Owner—But if the land is platted by a person not the owner, and the real owner afterwards recognizes the plat and conveys lots according to the de-

2—Sec. 1, Ch. 109, R. S.

3—Gridley v. Hopkins, 84 Ill. 528; People v. Herbel, 96 Ill. 384; Smith v. Young, 160 Ill. 163; Baugan v. Mann, 59 Ill. 492.

4—Herman v. Commissioners of Highways, 109 Ill. 61.

scription in the plat, he is afterwards estopped from claiming the plat to be invalid; by referring to the plat in his conveyances the owner adopts and makes the plat a part of his deed of conveyance, and his grantees are also estopped because the plat has received the approval of their grantor.⁵

§ 1705. Surveying and Platting—It would seem from the authorities that the provisions of the statute in regard to surveying and platting the subdivision must be substantially complied with in order to make the subdivision a legal statutory subdivision.⁶

If it be contended that the observance of every requirement of the statute is not essential to the validity of the plat, still enough must appear to enable a location, by metes and bounds, of the streets, alleys, ways and roads, and to distinguish them from lots before the title to them can vest in the city by operation of the plat. The plat has by force and effect of the statute the effect of a deed and to have that effect it should describe the streets and alleys with such certainty, by measurements and description, that they may be located.⁷

Where the statute requires that the plat should be certified by the county surveyor, or by the county surveyor of an adjoining county if there be no county surveyor, a plat certified by a deputy county surveyor does not comply with the statute and does not vest the title to the streets and alleys in the municipality.⁸

The plat offered in evidence in a certain case was not certified by the proper surveyor and not acknowledged before one of the officers named in and authorized by the statute to take and certify the acknowledgment of owners of land. These are essential statutory requirements, and can-

5—*Rees v. Chicago*, 38 Ill. 322;
Smith v. Flora, 64 Ill. 93; *Smith*
v. Heath, 102 Ill. 130; *Thompson v.*
Maloney, 199 Ill. 276.

6—*Chicago v. Drexel*, 141 Ill. 89;
Lamm v. Danville, 221 Ill. 119.

7—*Belleville v. Stookey*, 23 Ill.
388.

8—*Auburn v. Goodwin*, 128 Ill. 57.

not be omitted, or supplied by substituting something else in their stead.⁹

Although the evidence may not show a literal compliance, yet if it shows a substantial compliance with the provisions of the statute, that is all the law requires. If in all essential matters an exact compliance is shown that is sufficient to vest the title of the streets and alleys in the municipality.¹⁰

Where there are other monuments from which the location of the streets, alleys and lots can be ascertained with equal certainty the objection that there was no corner stone designated on the plat is ineffectual. This is all the purpose to be accomplished by designating a stone as a corner, and it cannot be the absence of this particular monument described in the statute which vitiates and renders void the plat as a statutory subdivision.¹¹

Where the plat in question shows an exact location of the section and quarter section lines, and also shows that these lines are a certain distance from the lines of the plat, the exact location of every street and alley and every lot in the subdivision with reference to the quarter section corner and with reference to the section line and quarter section line, as well as the distance from any lot line and from any street and alley line on the plat to the quarter section line or section line or quarter section corner are shown on the plat, it was held that the plat was made in substantial compliance with the statute. Judicial notice will be taken of the fact that at all government section corners permanent monuments exist, and from such section corners the quarter section corners and all other points on the section lines and quarter section lines may be definitely and exactly located, and there is no necessity under such a showing, for the surveyor to plant or fix a stone as a monument from which

⁹—*Thomas v. Eckard*, 88 Ill. 593; *Gould v. Howe*, 131 Ill. 490; *Wilder v. Aurora, D. & R. E. T. Co.*, 216 Ill. 493.

¹⁰—*Gebhart v. Reeves*, 75 Ill. 301; *Lee v. Mound Station*, 118 Ill. 304.

¹¹—*Gebhardt v. Reeves*, 75 Ill. 301.

the measurements could be made. The object of the provision of the statute was to make it possible to know and to locate to certainty the entire plat and all parts thereof.¹²

It was urged against a certain plat that the width of the streets was not stated on the plat. The name of each street and figures denoting its width was given. But it was said that the figures "66" do not denote feet, inches or chains. The certificate of the surveyor and the owner and the plat itself, taken as a whole, showed that the distances and the lengths and width of the streets, blocks, lots and alleys, were given in feet, and this was held to be sufficient.¹³

If the boundary of a street as shown by the plat of the subdivision is the margin of a river any accretions thereto will belong to the municipality as a part of the street.¹⁴

In construing a plat, to determine its meaning, the same rule applied to deeds will apply to plats; that is it will be construed most strongly against the maker.¹⁵

There can be no question that the true boundary line of lots in a subdivision are where they are actually run on the ground and marked by the monuments placed by the surveyor to indicate where they are to be found. The survey fixing the boundaries of the lots, streets and alleys is the original work, as the plat is made from it and intended to be a faithful representation of it. The purchasers of lots in a subdivision and the public authorities are bound by the monuments erected by the surveyor who laid out the plat and made the subdivision under instructions from the owner.¹⁶

§ 1706. Certificate of Surveyor—Acknowledgment by Owner—Statute—"The plat having been completed, shall be certified by the surveyor and acknowledged by the owner

12—*Corbin v. Baltimore & O. C. T. R. R. Co.*, 285 Ill. 439.

13—*North Chillicothe v. Burr*, 185 Ill. 322.

14—*Brooklyn v. Smith*, 104 Ill. 429.

15—*Ely v. Brown*, 183 Ill. 575.

16—*Wolpert v. Chicago*, 280 Ill. 187.

of the land, or his attorney duly authorized, in the same manner as deeds of lands are required to be acknowledged.¹⁷

§ 1707. Surveyor Not Competent to Impeach His Certificate—A plat completed, certified by the surveyor, acknowledged by the owner and duly recorded in compliance with the statute is properly admissible in evidence, and the surveyor who made the certificate found on the plat is not competent as a witness, to impeach his certificate.¹⁸

§ 1708. Acknowledgment by Owner—Statute—“The plat having been completed shall be certified by the surveyor and acknowledged by the owner of the land, or his attorney duly authorized in the same manner as deeds of land are required to be acknowledged.”¹⁹

Under the provisions of this statute the acknowledgment of the subdivision may be made either by the owner or his duly authorized attorney in fact. But it has been held by the courts that under the provisions of the former statutes an acknowledgment of a subdivision could only be made by the owner and not by an attorney in fact. And a plat acknowledged by a person as the attorney in fact of the owner was not a good statutory subdivision and did not convey the title to the streets and alleys to the municipality.²⁰

§ 1709. Officer Taking the Acknowledgment—The statute providing for the acknowledgment of plats, is this: “in the same manner as deeds of lands are required to be acknowledged.” Undoubtedly any officer authorized to acknowledge deeds of lands may rightfully take an acknowledgment of a plat of a subdivision. But under prior statutes the plat must be acknowledged by the owner before a Justice of the Supreme Court, Justice of the Circuit Court, or Justice of the Peace of the county in which the land was situated. (Gross’ Stat. 1868, Ch. 25, Div. I.) So where the

17—Sec. 2, Ch. 109, R. S.

18—Allmendinger v. McHie, 189 Ill. 308.

19—Sec. 2, Ch. 108, R. S.

20—Thompson v. Mahoney, 199 Ill.

276; Wilder v. Aurora, D. & R. E. T. Co., 216 Ill. 496; Gosselin v. Chicago, 103 Ill. 623.

acknowledgment was not taken before one of these officers, it was held not to be in conformity with the statute and there was no valid statutory dedication of the streets and the recording of the plat did not vest the fee of the streets in the municipality.²¹

§ 1710. Recording Plat—Statute—“The certificate of the surveyor and the acknowledgment, together with the plat, shall be recorded in the recorder’s office of the county in which the land is situated and such acknowledgment and record shall have like effect and certified copies thereof and of such plat or of any plat heretofore acknowledged and certified according to law, may be used in evidence to the same extent and with the like effect as in case of deeds.”²²

From the language of the statute the requirement of the statute that the plat should be recorded would seem to be as obligatory as the other requirements. In order to make a plat valid and binding all the requirements of the statute must be substantially complied with. So it was held that where no plat of a supposed subdivision was recorded no taxes or lien for taxes could attach to the supposed lots.²³

§ 1711. Statutory Subdivision Vests Fee of Streets and Public Ground in Municipality—Statute—“The acknowledgment and recording such a plat (that is, a plat by the owner), shall be held in law and equity to be a conveyance in fee simple of such portions of the premises as are marked or noted on such plat as donated or granted to the public, or any person, religious society, corporation or body politic, and as a general warranty against the donor, his heirs and representatives to such donee or grantee for their use or for the use and purposes therein named or intended, and for no other use and purpose. And the premises intended for any street, alleyway, common or other public use in any city, village or town, or addition thereto shall be held in the

21—*Vermont v. Miller*, 161 Ill. 210.

23—*People v. Clifford*, 166 Ill. 165.

22—Sec. 2, Ch. 109, R. S.

corporate name thereof in trust to and for the use and purposes set forth or intended.”²⁴

A plat, as a mode of conveyance, was unknown to the common law. It was unknown to the law of Illinois prior to the statute of 1833. So far as the streets and other public grounds were concerned, a plat was merely evidence of an intention to dedicate to the public.²⁵

The law provides a method by which the owner of real estate which is platted into town lots may, if he so desire, convey a determinial fee to the municipality by the execution of a properly executed acknowledged and recorded plat. When this course is adopted, the owner, having the power to make any disposition of his property he may see fit, can invest the municipality with the fee. If such statutory plat is made and recorded, all persons who subsequently purchase lots according to such plat will be presumed to have had notice that they acquire no private rights to the public streets.²⁶

It is the plat or map made out, acknowledged and recorded as required by the statute that constitutes a conveyance vesting the fee simple of the streets and alleys and other public places in the municipality.²⁷

If the plat is recorded before the incorporation of the municipality, the fee remains in abeyance subject to vest in the corporation as soon as it is created.²⁸

Where the plat is not a statutory one it can have no effect as a conveyance to the public of the fee to the streets and public grounds indicated thereon. Viewed in the most favorable light, can be construed only as an offer to dedicate, under which an easement may be acquired by the public.²⁹

24—Sec. 3, Ch. 109, R. S.

25—Ryerson v. Chicago, 247 Ill. 185.

26—Sears v. Chicago, 247 Ill. 204; Gebhardt v. Reeves, 75 Ill. 301; Winthrop Harbor v. Gurdes, 257 Ill. 596.

27—Winnetka v. Prouty, 107 Ill. 218.

28—Gebhardt v. Reeves, 75 Ill. 301; Winthrop Harbor v. Gurdes, 257 Ill. 596.

29—Rose v. Elizabethtown, 275 Ill. 167.

§ 1712. **Reservations in Plats and Subdivisions**—It would seem from an examination of the authorities that reservations may be made in plats of subdivisions with the like effect as in deeds; so an easement may be imposed on one lot in the subdivision for the benefit of another lot therein, provided there is a proper reservation in that regard in the plat.

Where a plat shows that a certain lot is a certain number of feet wide between certain black solid lines, but that a dotted line runs along the side thereof, separating a certain portion thereof from the other part of the lot, and the space between the dotted line and the solid black line is marked "Reserved for Private Alley," and that such space connects with an alley, and this alley connects with another space also marked "Reserved for Private Alley," so that the several spaces so connected from a continuous course through the block, from street to street, it was held that an injunction would lie against the owner of the lot from which the land in the strip was taken to prevent him from closing up the space so marked "Private Alley," at the suit of a party owning another lot in the block abutting upon such private alley.³⁰

Where a strip of land is taken from certain property and marked on the plat "Private Alley," this may be construed as being private to the use of the property from which it is taken, provided the party platting the property is not the owner of the land on the other side. But where the platter is the owner of the land on both sides of the private alley, it will be considered as private to all the property owned by him; and the owner on one side of the alley will be entitled to keep the alley open for his use.³¹

Where, by deed subsequently executed, the grantor modifies or limits the scope of the building line restrictions, shown on the plat, the modification made in such restrictions by the subsequent deed will govern.³²

30—*Smith v. Young*, 160 Ill. 163.

31—*Cihak v. Klekr*, 117 Ill. 643.

32—*Kearnet v. Kirkland*, 279 Ill.

516.

§ 1713. Municipality Without Power to Grant Away Rights of the Public Nor Allow Encroachments Thereon—

It is the right of the public to use the streets and highways as a means of travel and it is the right of a citizen to ride or drive over the streets of a city without charge and without toll provided he does so in a reasonable manner.³³

Whatever title the city has in the streets and other public grounds is in trust for the public, and this is true whether it owns the fee or only an easement. The interest of the public, which is the primary object of the trust, must always be paramount to any other interest. The city cannot give away the rights of the public, nor can they be encroached upon by private individuals, to the detriment of the superior rights of the public.³⁴

Where lands have been dedicated for a particular purpose, the municipality having the land in charge cannot divert it from that purpose, and it is beyond the power of the legislature to change the legal results of the act of dedication.³⁵

It is not necessary, however, that all the property dedicated for a street should be used or improved as a highway. The corporate authorities have the power to set apart a portion of it as a park, or to be used as a grass plat as a beautification of the highway.³⁶

§ 1714. Municipality May Allow Use of Street Owned by It for Any Purpose Not Inconsistent with Public Use—

Whatever may be the rule in other jurisdictions, the law is settled in this state the city may, under the power of the exclusive control of the street, allow any use of them which is not inconsistent with the public objects for which they are held.

And it is equally well settled that the city may regulate such use and fix a reasonable compensation to be paid for

33—Chicago v. Collins, 175 Ill. 445.

36—Shirk v. Chicago, 195 Ill. 298.

34—Sears v. Chicago, 247 Ill. 204.

35—Ward v. Field Museum, 241 Ill.

the same. The power of the municipality in this regard in cases where it owns the fee of the streets is subject to no limitation except that its exercise shall be reasonable and in a manner to safeguard the rights of the public to the free and unobstructed use of the street for the purpose for which it was dedicated.

In cases, however, where the municipality has only an easement in its streets, and the fee remains in the abutting owner, the relative rights of the municipality and the abutting lot owners are to be determined under entirely different rules of law. When private property is taken for public use, the general rule is that it can only be taken to the extent that the public use to which it is applied requires. A law could not be sanctioned which would permit a corporation to condemn private property for the sole purpose of applying such property to a purely private use.³⁷

A park is a piece of ground in a city or village set apart for ornament, a place for the resort of the public, to afford the benefit of light and air, exercise, recreation or amusement. A deviation from the use of a piece of ground dedicated as a park from its purpose as a park is a violation of the purpose for which it was dedicated; so, running a public street through a piece of ground so dedicated, by the corporate authorities of the municipality is a violation of its trust and may be enjoined.³⁸

Where a plat of ground is dedicated to the public and marked "Plaza," the municipal authorities may use it as a public market ground, common or park, enclosed or unenclosed, or partly enclosed and partly unenclosed, as such is the meaning of the word.³⁹

The municipal authorities hold the streets and highways in trust to be used by the public, and they, therefore, are without power to convert or appropriate them to private

37—*Sears v. Chicago*, 247 Ill. 204.

39—*Sachs v. Towanda*, 79 Ill. App.

38—*Riverside v. Maclain*, 210 Ill. 439.

use; so where an ordinance of a city by its terms proposes to impair the rights of the public to a part of a sidewalk, and authorize a private person to use a part of the sidewalk to the exclusion of the public, such an ordinance is void and the exercise of rights under it may be enjoined.⁴⁰

Where the city owns the fee of a street, the abutting owner has the right to ingress and egress and an easement to the light and air in addition to the right to use in common with all other persons. The owner of the abutting lot upon the street which has been dedicated to the public in accordance with the statute has neither the possibility of a reverter, nor any title, right or interest, in law or equity, under which he can justify the exclusive appropriation of any portion of the street either on the surface or above or below it, without the consent of the municipality.⁴¹

§ 1715. Fee in Property Condemned for a Street—A proceeding to condemn property for a public street leaves the fee of the street in the owner whose property is condemned, and an injunction will lie by such owner or his grantee to prevent the municipality from interfering with the use of the property condemned for purposes other than as a public street, which does not interfere with the use of the property as a public street.⁴²

If the public authorities institute proceedings to condemn property to lay out a public road over a strip of land the existence of a highway over the same being in controversy, the taking of such proceedings amounts to an admission that there is no public highway there at that time.⁴³

§ 1716. Plat or Copy as Evidence—The importance of observing the statutory requirements will be noted when it is remembered that the original plat, or a certified copy from the record, is under the statute competent evidence of

40—*Ainsfield v. Grossman*, 98 Ill. App. 180; *Snyder v. Mt. Pulaski*, 176 Ill. 397.

41—*Sears v. Chicago*, 247 Ill. 204.

42—*Illinois T. & S. Bank v. Chicago*, 247 Ill. 264.

43—*Woodburn v. Sterling*, 184 Ill. 208.

the subdivision, and as such is an important muniment of title.⁴⁴

It may be true that a litigant may establish his title to a town or city lot without there being a statutory subdivision; but the method of doing so is exceedingly cumbersome and difficult. It might be well here to show the method of proving title to a lot in a non-statutory subdivision.

§ 1717. Method of Proving Title to Lot in Non-Statutory Subdivisions—It is only subdivisions which are platted, certified and acknowledged in accordance with the statute that are entitled to be recorded; and it is only such plats, or certified copies from the record, which are admissible in evidence; a certified copy of a plat made from the public records which is neither signed nor acknowledged by the owner is not admissible in evidence, without some supporting evidence.⁴⁵

So the question, as to how the title to a lot in a non-statutory subdivision, may be proved, becomes important. It has been held that although the plat may not be in strict accordance with the statute, yet, if it has been recorded, and the lots therein described can be identified and located by a surveyor, either with or without extrinsic evidence, that is sufficient and such evidence is admissible.⁴⁶

And if the owner of lots in a subdivision makes conveyance of them as described in the plat, then, if the plat be recorded, such plat, and all particulars thereon shown are to be considered as a part of the deed the same as though recited therein.⁴⁷

The various provisions respecting the laying out of town lots do not make it necessary to produce the plat in every controversy concerning the title to a town lot. But a party may establish title to a piece of ground, described in his

44—*Allmendinger v. McHie*, 189 Ill. 308.

45—*Dale v. Metzmaker*, 63 Ill. 38.

46—*Koeling v. People*, 196 Ill. 353.

47—*Thompson v. Maloney*, 199 Ill. 276; *Henderson v. Hatterman*, 146 Ill. 555.

deed as a town lot, although no plat has ever been made or recorded. He is not to be prejudiced by the omissions of his grantor to comply with the requirements of the statute, if he can give locality to the premises intended to be conveyed. The plat in such case is not a necessary muniment of title. Any evidence which tends to solve the question of the locality of the ground is properly admissible. So where the plaintiff in ejectment offered in evidence a report and a plat from the county surveyor, with his certificate thereon, and a survey of the piece of land was made to show the location of a ground, and offered to prove, by the surveyor in connection with the plat and certificate, the exact location of the ground, boundaries, etc., which evidence was held admissible.⁴⁸

And when the plaintiff in an action of ejectment offered in evidence the record book of a town plat, to which the defendant objected because the law did not allow such a document to be recorded, it neither being authenticated or acknowledged, it was held admissible in connection with the evidence of a witness in regard to his knowledge of the land, and able by that means to locate the ground; that the plat, taken in connection with the evidence of the witness was properly admitted in evidence.⁴⁹

The location of a town lot may be fixed by a witness from common repute irrespective of any plat; so where a witness testified that he knew the location of the land, and what was known and called a certain town plat, and he located the lot by his testimony, that will be sufficient.⁵⁰

It will be noticed that the method above suggested requires considerable oral evidence when it becomes necessary to trace the title to such a lot from the government. It becomes necessary at least to show that there was such a subdivision either recorded or not recorded, and it is doubtful whether this can be shown by a certified copy; must it not be shown by oral evidence?

48—*Manly v. Gibson*, 13 Ill. 308.

49—*Bowman v. Wittig*, 39 Ill. 416.

50—*Holbrook v. Debo*, 99 Ill. 372.

§ 1718. Penalty for Platting Contrary to the Act—Statute—“Whoever shall lay out any town or make any addition to any city, village or town, or re-subdivide any lots or blocks therein, and neglect to plant any corner stone when required by this act or shall survey the same or cause it to be surveyed in any manner than that which is prescribed by this act, shall be fined in a sum not less than \$25, nor exceeding \$100.”⁵¹

The design of the statute in requiring a plat to be made and recorded is to render the rights of individuals and the public definite and certain; and to accomplish this object penalties are imposed on proprietors and surveyors for failing to pursue the directions of the statute.⁵²

§ 1719. Penalty for Selling Lot Without Legally Platting—Statute—“Whoever shall sell or offer for sale, or lease for any time exceeding five years, any lot or block in any town, city or village, or any addition thereto, or any re-subdivision of any lot, or block therein, before all the requirements of this act have been complied with, shall be fined \$25 for each lot or block or part thereof so disposed of, offered for sale or leased.”⁵³

§ 1720. Frauds in Subdividing Lands Enjoined—Where the owner of lands attempts to commit a fraud in the subdivision or re-subdivision of lands owned by him a court of equity may enjoin the fraud and prevent its completion. So where an owner of lands makes a subdivision thereof and bargains and sells lots as shown by the plat, but after such sale proposes to make and record another and different plat, by which the purchaser is deprived of the benefit of certain streets, a court of equity may by decree restrain the vendor from re-platting in such a manner as to prevent the purchaser of the advantage of such streets.⁵⁴

§ 1721. Platting Lands in Proceedings in Courts of Record—Statute—“In any proceeding in any court of

51—Sec. 4, Ch. 109, R. S.

52—Manly v. Gibson, 13 Ill. 308.

53—Sec. 5, Ch. 109, R. S.

54—Mann v. Bergmann, 203 Ill.

407.

record in this state by executors or administrators for the sale of lands of deceased persons, or by guardians, for the sale of the lands of their wards, or for the partition of lands, when such lands are to be sold in parcels, or actual partition thereof shall be made, it shall be competent for the court to order such executor or administrator, guardian, master in chancery, special commissioner or other officer, or person authorized to sell the lands in question in any such proceeding, or commissioners to make partition of such lands, to cause such lands to be surveyed and subdivided, and a map or plat of the same to be made, showing the lots or parcels of such subdivision or partition designating in numbers or letters; which map or plat shall be acknowledged by the person or persons so causing the same to be made in like manner as is now required by law in cases of plats or maps made by owners of land, and shall in like manner, be certified by the surveyor or engineer making the same, which certificate shall contain, among other things, an accurate and definite description of the lands so subdivided or partitioned; and such map or plat shall be submitted to the court for his approval, and if approved by the court shall be recorded in the recorder's office of the county or counties in which the land in question in any such proceeding are situate." ⁵⁵

§ 1722. Owners Required to Plat Land Where Description Is Irregular—Statute—"In all cases where any tract or lot of land is divided in parcels, so that it cannot be described without describing it by metes and bounds, it shall be the duty of the owner to cause such land to be surveyed and platted into lots. Such plats shall be certified and recorded. The description of real estate in accordance with the number and description set forth in the plat, aforesaid, shall be deemed a good and valid description of the lot or parcel of land so described." ⁵⁶

55—Sec. 2, Ch. 109, R. S.

56—Sec. 62, Ch. 120, R. S.

§ 1723. Subdivision by County Clerk—Statute—“If the owner of any such tract or lot shall refuse or neglect to cause such survey to be made within thirty (30) days after having been notified by the county clerk, by publication of a notice in a newspaper in the county, having general circulation, at least three times, said clerk shall cause such survey to be made and recorded, and the expense of the publication of such notice and of making such survey shall be added to the tax levied on such real property, and when collected, shall be paid, on demand to the person to whom it is due.”⁵⁷

§ 1724. Rights of the Public in Proper Description of Lands—The public has an interest in having each tract of land, subject to taxation so described that it can readily be located from a description of it in the assessment roll, and in the proceedings that may be necessary for the enforcement and collection of the taxes against it. By the provisions of the statute it is evident that the legislature intended to provide the means by which defective descriptions of land and lots could be remedied and proper lists thereof made for assessment purposes. If the owner does not perform his duty under section 62 and have such tract surveyed and platted and such plat recorded, it then, under section 63 becomes the duty of the county clerk to give the notice to the owner required by the section and, if he refuses to perform such duty, for thirty days after the notice, to cause a survey and plat to be made under his direction, the county clerk may be compelled to perform his duty.⁵⁸

§ 1725. Statutory Requirements Essential—A plat of a subdivision made by an officer to facilitate taxation is fatally defective if it fails to comply with the provisions of the statute, and if from it neither the exact location nor the quantity of land can be known, and judgment for taxes thereof may properly be refused by the court.⁵⁹

57—Sec. 63, Ch. 120, R. S.

59—People v. Reat, 107 Ill. 581;

58—People v. Purviance, 12 Ill. App. 216.

People v. Chicago & A. R. R. Co., 96 Ill. 369; Ely v. Brown, 183 Ill. 575.

But an assessor in making a plat does not represent the public and cannot by any act of his create a public highway. No such authority is conferred upon him. The easement which an adjoining owner has in an alley cannot be taken away from him by any act of the assessor.⁶⁰

§ 1726. Effect of Maps or Plats Made in Court Proceedings—Statute—“Maps or plats made in conformity with the preceding section (Sec. 10, Ch. 109, R. S.), when approved by the court, shall have the like authenticity as maps or plats made by owners of the same, and shall be sufficient in law for all purposes whatever.”⁶¹

§ 1727. Cost Incurred in Making Plat in Court Proceedings—Statute—“The costs and expenses necessary in making such subdivisions of lands and maps, or plats of the same, together with the costs of recording thereof, shall be taxed as costs in any suit or proceeding in which the court shall order the same to be made.”⁶²

§ 1728. Fee of Bed of Navigable Rivers—Neither the Illinois, the Mississippi, nor the Chicago rivers is a navigable stream in the sense of the common law, which prevails in full force in this State by legislative enactment. No river by common law, was deemed navigable above the ebb and flow of the tide. The streams above belong to the proprietors on each side of it, *ad filum aquae*.⁶³

§ 1729. Methods of Dedication—There are several methods by which private property may be dedicated to public uses by the owner. The most usual is by platting and recording the plat. The statutes and decisions of the courts of Illinois recognize two methods of dedication by plat, called respectively the “statutory method” and the “common law method.” Whatever method may be employed in the dedication the rights of the public are substantially the same; that is the public is entitled to the use of the

60—Chicago v. Borden, 190 Ill. 430.

61—Sec. 12, Ch. 109, R. S.

62—Sec. 13, Ch. 109, R. S.

63—Chicago v. McGinn, 51 Ill. 266;

Middleton v. Pritchard, 3 Scam. 510.

land for the use for which it was dedicated. But in a statutory dedication the fee of the land passes to the municipality and it is entitled to the use of the land for all municipal purposes.

A statutory dedication arises where a plat of the land is made and recorded in strict or substantial compliance with the statute; a common law dedication is one in which the requirements of the statute are not so observed.⁶⁴

§ 1730. Uses and Purposes for Which Lands May Be Dedicated—Under the provisions of the statute lands may be dedicated, donated or granted to the public or any person, religious society, corporation or body politic, for the uses and purposes therein named or intended but for no other purpose. But in order to constitute a dedication it is not absolutely necessary that the land shall be platted as such. It is well settled, that no particular form or ceremony is necessary to dedicate land for the purposes of a cemetery. All that need be shown to constitute such a dedication is the assent of the owner, and the fact that the land is used for public purposes intended by the appropriation. So where it appeared that the owner of the land recognized the ground in question as a cemetery for about fifty years, and during that time he not only buried his own relatives therein, but permitted others to bury their dead there and to erect monuments over them and to protect and preserve the identity of the remains there buried, it was held that a bill showing such facts was not subject to a demurrer, and it was error for the trial court to sustain such a demurrer and dismiss the bill.⁶⁵

Private Ways—It may be proper here to distinguish between public and private ways.

Where a strip of land is reserved for an alley between the parties to a deed, or where, by the terms of the instru-

64—Powell v. Gilman, 38 Ill. App. 611; Williams v. Chicago, 247 Ill. 240; Sears v. Chicago, 247 Ill. 204.

65—Wormley v. Wormley, 207 Ill. 411; Davidson v. Reed, 111 Ill. 167.

ment creating the alley, the appropriation of the lands embraced therein is for the use of a particular person only, the alley is a private alley. Where there is a right of way the use of which is confined to particular persons, and to the owners of property abutting thereon, it is regarded as a private right of way. A private right of way serves as a means of communication to a limited neighborhood for local convenience. It has been defined to be: that right which one man has of going over another's land, and is confined to the inhabitants of a particular district, or to those occupying or owning certain estates, or it extends to one or more individuals in certain.⁶⁶

§ 1731. Common Law Dedication of Land—The uses and beneficial purposes of a public square or common in a village or city where no special limitation or use is prescribed by the terms of the dedication, are entirely different from those of a public highway. Such a place dedicated to the public, may be improved or ornamented for pleasure grounds and amusements for recreation and health. A public highway comprehends the right of all individuals in the community, whether on foot, horseback, or in any kind of a vehicle, to pass and repass together with the right of the public to do all the acts necessary to improve it and keep it in repair, and it cannot be enclosed; but a public square may be enclosed, notwithstanding it has remained open for many years. The uses and purposes of a public square or common are, in some respects different from those of a public highway, as stated above. But while a public square or common may be enclosed, it must, for the purposes of the dedication, remain free and common to the use of all the public.⁶⁷

What shall amount to a dedication has often been stated by the Supreme Court. It has been held that in every case there must be an intention to dedicate, and no particular time is necessary for evidence of dedication; it is not, like

66—*Chicago v. Borden*, 190 Ill. 430.

67—*Guttery v. Glenn*, 201 Ill. 275.

a grant, presumed from length of time. If the act of dedication is unequivocal, it may take place immediately. When ground is dedicated to the public and accepted by them, it then becomes public ground, and acceptance may be shown by user by the public, as by travel, or by the acts of public officers in repairing it and keeping it up. A dedication is to be proved not alone by deed, but by matter *in pais*, consisting of acts and accompanying declarations of the owner of the land alleged to be dedicated. Such acts coupled with such evidence of acceptance by the public as above alluded to, make out a case of dedication.⁶⁸

And when land lying uninclosed and in common, until circumstances induce the owner to enclose, no strength or inference or conclusion can be induced from a mere travel across it by the public without objection by the owner; and so long as the adjoining land remain unenclosed such use cannot ripen into a prescriptive right; so an instruction to the jury that does not except unenclosed and unimproved lands, lying in common, from the operation of the general rule in regard to the prescriptive right to travel, is erroneous.⁶⁹

In order to justify a claim that the title to a tract of land has been divested by dedication, the proof should be very satisfactory, either an actual intention to dedicate, or of such acts and declarations as should equitably estop the owner from denying such intention. The intention of a party must govern as to a dedication, and if it is a public highway, it must be by the owner of the title to the land.⁷⁰

In arriving at a conclusion as to whether an act was done by a land owner with the intention of dedicating it to the public use the location of the property and all its surroundings must be considered. The intention to dedicate will be more readily presumed in regard to urban than country,

68—Rees v. Chicago, 38 Ill. 322.

70—Kyle v. Logan, 87 Ill. 64.

69—Peyton v. Shaw, 15 Ill. App.

and in regard to well settled or frequented country than in regard to wild, wood, waste or unfrequented land. Whether or not a proprietor has made a dedication is always a matter of intention. No particular form is necessary or required as to the validity of a dedication. The owner of the land however must do some act, or suffer some act to be done, from which it can fairly be inferred he intended to dedicate it to the public. So it was held that where the owner of the land built or caused to be built a fence north of his south line the usual width of a street, he intended to dedicate the land south of the fence as a public street.⁷¹

The law will imply an intention to dedicate to a public use from any acts of the owner which indicate an intention to so appropriate it, and, if the apparent dedication is accepted by the public, the dedication becomes complete. The public may rely on that which the land owner has done as indicative of his intention, and if his conduct has been such as to lead an ordinarily discreet and thoughtful man to infer an intention to make a dedication, the public may rely on such act as a dedication, and accept the same for public use. And when so accepted the dedication cannot be recalled by the owner.⁷²

The mere fact of platting of a town gives the public the right to the use of the streets and alleys where at the time there is no adverse possession.⁷³

It will be conceded that where an owner of a tract of land subdivides it, and makes, acknowledges and records a plat of his subdivision, designating thereon certain strips of land as streets and highways, such plat, though not made in accordance with the provisions of the statute, will be evidence of an intention, as well as an offer, to dedicate to the public a right of way over the strips of land thus designated as at common law.⁷⁴

71—*Moffett v. South Park Coms.*,
138 Ill. 620.

72—*Seidschlag v. Antioch*, 207 Ill.
280.

73—*Hatton v. Chatham*, 24 Ill. App.
622; *Smith v. Chicago*, 107 Ill. App.
270.

74—*Chicago v. Drexel*, 141 Ill. 89.

If the owner of land lays out and establishes a town, and makes and exhibits a plat of the town, with various plats of spare ground and sells lots with reference to the plan, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege and advantage, which the plan presents, as belonging to them, as a part of the town, or to their owners, as citizens of the town. The sale and conveyance of lots in a town and in accordance with its plan, imply a grant or covenant to the purchasers that the streets and other public places indicated, as such upon the plan, shall be forever open to the use of the public, free from all claim or interference by the proprietor inconsistent with such use.⁷⁵

In such case it makes no difference that no municipal corporation exists which could accept the dedication at the time the dedication is made. It is enough that the lots are offered, sold and bought with the understanding that the designated portions are intended for public use, such as parks and commons. A municipality upon its subsequent organization becomes the trustee for the public to the extent of the dedication.⁷⁶

Although a plat, by reason of its defective acknowledgment, may not be a good statutory plat, still if the land owner plat the ground as an addition to a city or village and places the plat on record and he indicates thereon by proper names and descriptions the streets, alleys and public grounds in said addition, or by any proper designation clearly indicates upon such plat that certain portions thereof are set aside and intended for a specific public use, such plat, though not in conformity with the statute, will be deemed an offer on the owner's part to dedicate to public use the portions shown on the plat to have been set aside for the use of the public.⁷⁷

75—*Zearing v. Raber*, 74 Ill. 409;
Maywood Co. v. Maywood, 118 Ill. 61.

76—*Riverside v. Maclain*, 210 Ill.
308.

77—*Birge v. Centralia*, 218 Ill. 503.

The public is an ever existing grantee, capable of taking dedications for public use, and its interests are a sufficient consideration to support them. The mode of dedication is immaterial. They are not within the statute of frauds, and are good by parol. The intention of the party, manifested by express consent, or acquiescence in the user, will govern in determining whether it be a dedication or not.⁷⁸

A map of the survey is not essential to the validity of a dedication. A dedication may be made by a survey and plat alone without any declaration, either oral or on the plat, when it is evident from the face of the plat that it was the intention of the proprietor to dedicate.⁷⁹

It is well settled law that a written contract, unambiguous in its terms, cannot be varied, contradicted or modified by parol evidence of anything that occurred at or prior to the time at which the contract was executed; this rule of law applies to plats of subdivisions.⁸⁰

Each and every owner of a lot or block in a common law subdivision holds title to the center of each street upon which his property abuts; but each and all the owners have also a like general interest and a right in all the streets and no one owner may assume absolute and exclusive ownership or control of one-half of the street upon which his property abuts. In a common law subdivision the right does not attach to each individual owner to withdraw the offer as to that part of the street upon which his lot abuts. Each purchaser is presumed to have bought in view of the system of streets and ways designed by the proprietor of the plat to provide means of ingress and egress to and from all parts of the platted ground, not only for the use of the owners and occupants of the lots, but all who might desire to pass along such street and ways. The arrangement of the streets and ways formed a part of the consideration for

78—Warren v. Jacksonville, 15 Ill. 236.

80—Schneider v. Sulzer, 212 Ill. 87.

79—Godfrey v. Alton, 12 Ill. 29;
Maywood Co. v. Maywood, 118 Ill. 61.

the purchase of the lots and blocks, not only as to the original proprietor and those who purchased from him but also as to all subsequent vendors and vendees.⁸¹

Section 16, Township 39 North, Range 14, East of the 3d principal meridian was granted by the United States to the State of Illinois for the use of schools, and the grant was accepted by the State. This section was platted by the School Commissioners, appointed pursuant to an act of the legislature of Illinois, adopted in 1829, and the plat recorded in the Recorder's Office of Cook County between 1833 and 1836, and was known as School Section Addition to Chicago. But this plat failed in many respects to comply with the requirements of the act in regard to platting and recording subdivisions. Truman G. Wright, having acquired the title to block 138, in said subdivision, platted the block into lots in 1836. But this plat also failed to comply with the requirements of the statute in regard to platting and recording subdivisions. In 1843 the legislature enacted a statute as follows: "That the recorder of the county of Cook is hereby required to certify upon the maps or plat of the school section recorded in his office in book A, page 315, that the same is the plat of the School Section addition and added to the town of Chicago, and to make such other certificates upon said maps as the common council of Chicago shall direct to remedy any omission or defect in the same, and said plat or map, when so certified, is hereby declared to be good, valid and legal for all purposes whatever, any omissions or defects in the same to the contrary notwithstanding, and the same shall hereafter be deemed good, valid and legal and all omissions and defects in the same cured by this law, and the common council of such city are hereby authorized to cause said school section to be resurveyed and the same run out so as to correspond with said plat."

81—Clark v. McCormick, 174 Ill.
164.

In 1906 the city council passed an ordinance prescribing the terms and conditions under which the abutting property might use the sub-sidewalk space adjacent to their property for private purposes in connection with the buildings located on such lots. In the same year an owner of a lot abutting on certain streets in said Wright's Subdivision exhibited a bill in the circuit court to enjoin the city from enforcing the ordinance as to his property. The Supreme Court in a very lengthy, elaborate and exhaustive opinion, on an appeal of the case, said in part: "Whatever title the city has in its streets and other public grounds is held in trust for the public, and this is true whether it owns the fee or only an easement. The interest of the public, which is the primary object of the trust, must be paramount to all other interest. The city cannot grant away the right of the public, nor can they be encroached upon by private individuals, with or without the consent of the municipality, to the detriment of the superior rights of the public. Where the title to its streets is acquired by dedication of the owner in accordance with the statute relating to plats, the acknowledgment and recording of such plat have the effect, both in law and equity, to convey a fee simple title to the city of such portions of the premises platted as are noted on the plat as donated to the public. Where the city owns the fee of the streets, the abutting lot owner has the right of ingress and egress, and an easement for light and air in addition to the right to use the street in common for all other purposes. The owner of an abutting lot upon a street which has been dedicated to the public in accordance with the statute has neither the possibility of reverter, nor any right, title or interest, in law or equity, under which he can justify an exclusive appropriation of any portion of said street either on the surface or above or below it, without the consent of the municipality. * * *

In cases, however, where the municipality only has an easement in its street and the fee remains in the abutting

lot owner, the relative rights of the municipality and the abutting owner are to be determined under entirely different rules of law. Where private property is taken for public use the general rule is that it can only be taken to the extent that the public use, to which it is to be applied, requires. A law could not be sanctioned which would permit a corporation to condemn property for the sole purpose of applying such property to a purely private use. * * *

So, one buying a lot abutting on a street in which the city has only an easement must be presumed to have purchased with knowledge of the fact that a conveyance of an abutting lot carries the title to the center of the street, subject only to the easement of the public therein. The abutting lot owner being thus the owner of the fee to the center of the street upon which his lot is situated, has the right to make any reasonable use of the same which does not interfere with the full enjoyment of the easement which is held for the use of the public. It is as unreasonable as it is illogical to say that the abutting lot owner who owns the fee in the street, subject only to an easement in the public, must pay the city for the privilege of using his own property in a manner which in no way interferes or disturbs the full enjoyment of the easement. It follows, we think, from the foregoing principles of law, that the validity of the ordinance involved cannot be questioned when applied to the owners of lots located upon streets which the city owns in fee, and it is equally clear that the ordinance cannot be enforced against owners of lots abutting on streets where the city has only an easement." 82

The reader will doubtless pardon this lengthy excerpt from this opinion; it is one of the most recent and well considered opinions in the reports.

§ 1732. Common Law Plat as Evidence of Dedication—Where the question arises between a claimant of the property and the municipality, and the common law subdivision

and plat is relied upon as evidence of such dedication, in order to establish such a dedication by the plat the proof must be clear and convincing that the owner intended to dedicate the land to the public use as a street and the public have accepted it for that purpose. So where the plat was a common law one it can have no effect as a conveyance. So where a common law plat fails to show that the word "street," or any other word to indicate that the strip of land was intended to be dedicated to the public, it cannot be said from the plat alone that the original owner intended to dedicate the land to a public use.⁸³

Although the plat, by reason of its defective acknowledgment, may not be a good statutory plat, still if the land owner platted ground as an addition to a village or city and placed the plat on record, and he indicated thereon by proper names and descriptions the streets, alleys and public grounds in said addition, or by any proper designation clearly indicated upon said plat that portions thereof are set aside and are intended for specific public use, such plat, though not in conformity with the statute, will be deemed an offer on the owner's part to dedicate to public use the portion shown on the plat to have been set aside for the use of the public. If, however, all that is shown on the face of the plat is a blank space, and there is nothing to show that the land covered by such blank space has been devoted to a public use, it cannot be held, from the face of the plat alone, that the owner intended, by making and recording the plat, to devote the premises represented by the blank space upon the plat to a public use.

To show a dedication it should clearly appear that the owner intended to give the land to the public. It is not sufficient that some private use is not shown; and no presumption that the owner intended to deprive himself of the land can be relied on to explain any ambiguity or uncer-

83—Rose v. Elizabethtown, 275 Ill.

167.

tainty. The particular use for which the land was intended must plainly appear. The proof of the acts must be clear and unequivocal.⁸⁴

§ 1733. Unsubdivided Blocks in Plat—Object and Purpose to Be Shown—It appeared that the proprietors in making a subdivision of their land as a town plat left one block vacant or not subdivided into lots as were the other blocks. There was no indication on the plat as to why this block was left unsubdivided or blank, except that the deputy surveyor in his certificate makes a reference to the “square” or “public square.” For more than a third of a century this block had remained vacant. But the village becoming incorporated the village authorities proposed to move the village hall upon the block; a bill was filed, evidently by citizens of the village, to enjoin the officers from so doing. The evidence showed that the proprietors in selling lots fronting on this block recognized it as public grounds and sold lots fronting it at an enhanced price, and one of the proprietors in his testimony, taken at the hearing, testified that the land comprised in the block originally belonged to him; that it was the intention that it should forever remain an open square as a beauty, convenience and charm to a country village, and it was with that view that lots fronting on it were sold at an enhanced price. Had this intention been expressed on the plat, or even in a contemporaneous certificate, it is clear, on principle and authority, the village authorities could not lawfully appropriate it to any other public use. It would have been an abuse of the trust reposed in them that the courts would not hesitate to control so that the property might be preserved for the use intended by the donors.

Where there is no express grant to the county, it certainly cannot erect public buildings on the public square, unless authorized so to do by the custom of the country

⁸⁴—*Birge v. Centralia*, 218 Ill. 503; *field v. Grundmann*, 164 Ill. 250; *Chicago v. Drexel*, 141 Ill. 89.
Grube v. Nichols, 36 Ill. 92; *Wheat-*

or usage to which all citizens are willing to submit as to a positive enactment. A county has no more inherent right to appropriate the exclusive use of property not dedicated expressly to it, but to the citizens or public generally. It has no more right than an individual, to prevent or disturb the enjoyment of the inhabitants in any public grounds dedicated to their use.

Where nothing appears to indicate for what purpose a grant or donation of land is made, no reason is seen why parol evidence is not admissible to show the object to which it was to be devoted. Otherwise, the court would be left to determine the use by mere conjecture, or be compelled to declare the purpose as a conclusion of law. Where the intention is not made manifest by any expression as to the use, the dedicators will be permitted to show, by extrinsic evidence, they intended a different public purpose, and the injunction granted by the trial court was sustained by the Supreme Court.⁸⁵

§ 1734. Acceptance by the Public Essential to Dedication—In order to vest the title to the streets and alleys in the municipality, there must be an acceptance of the plat by the municipality. Until an acceptance of the proposed dedication by the municipal authorities of a city or town, although the original proprietor may be estopped to deny a dedication of the streets and alleys as against intervening rights, his acts in platting and acknowledging and recording such plat are in the nature of a mere offer to the municipality, and until the proper authorities accept the dedication they cannot be bound to open and improve the streets, and until such acceptance they can have no right in streets, and an acceptance of a dedication cannot be presumed from the mere proof of the execution and recording of the plat.⁸⁶

No formal act or ceremony is necessary to an acceptance,

85—*Princeville v. Auten*, 77 Ill. 325. burg, 217 Ill. 384; *Jordan v. Chenoa*,
86—*Reichert Milling Co. v. Free-* 166 Ill. 530.

and it is not necessary that there should be any record of such an act by which the public would be invested with an easement or title. And unless there is something to show that the acceptance was limited and that some part of the offer was rejected an acceptance of a part should be deemed an acceptance of the whole as offered.⁸⁷

The acceptance may be an express one, evidenced by some formal act by the public authorities, or it may be implied by their acts, such as repairing, lighting or assuming control of the lands dedicated, or may be implied by user by the public for the purpose for which it was dedicated. When the dedication is very beneficial or greatly convenient or necessary to the public, acceptance will be implied from slight circumstances.⁸⁸

But where there is no evidence of an acceptance by the public authorities of a common law dedication the presumption of the acceptance on the ground that it was favorable to the public will not prevail.⁸⁹

The general rule is, that if all the facts and circumstances, taken and considered together, clearly, certainly and satisfactorily show that the public, or the authorities acting in behalf of the public, intended to accept the dedication, then an acceptance is proven. Stronger evidence of an acceptance will be required where it appears that the street would not be beneficial than if it appeared that it would be beneficial.⁹⁰

An express acceptance may be shown by some order, resolution or action of the public authorities made and entered of record. So a resolution by the common council of a city authorizing the construction of a railroad through the land dedicated is in effect an acceptance.⁹¹

87—Sullivan v. Tichenor, 179 Ill.

90—Dewey v. Chicago, 274 Ill. 268.

97.

91—Kimball v. Chicago, 253 Ill.

88—Rose v. Elizabethtown, 275 Ill. 105.
167.

89—Atchison, T. & St. F. R. R. Co.
v. Stamp, 290 Ill. 428.

An acceptance may be shown by user by the public for the purpose for which the dedication was made.⁹²

By the acts of public officers in regard to the premises; by repairing a highway at public expense; by placing the road on the road map of the district; by an acceptance of a deed of the land; by building culverts, grading, graveling and macadamizing a road; by cutting underbrush and weeds from it; by fencing it or exercising authority over it, by the consent or without objection of the owner.⁹³

The acceptance need not immediately follow the offer of dedication but it must be within a reasonable time and before the offer to dedicate is withdrawn.⁹⁴

The immediate opening and use of streets and highways in a subdivision, by the public, or an immediate formal acceptance by the public authorities, is not necessary to give effect to the dedication of lands to the public use or to prove an acceptance of the dedication. The public authorities are allowed a reasonable time for opening and improving streets, and to defer doing so until the requirements of the public requires their improvement, and if a common law dedication is accepted, any time before its withdrawal, by a deed of revocation, such acceptance is binding on the owner of the land.⁹⁵

Where the dedication is of benefit to the public an acceptance will be implied from slight circumstances.⁹⁶

There must, however, be a usure, or some other act indicating acceptance by the public authorities.⁹⁷

An acceptance must be such as will impose upon the pub-

92—*Davidson v. Reed*, 111 Ill. 167; *Maywood Co. v. Maywood*, 118 Ill. 61; *Wormley v. Wormley*, 207 Ill. 411.

93—*Moffett v. South Park Com.*, 138 Ill. 620; *Clark v. McCormick*, 174 Ill. 164; *Woodburn v. Sterling*, 184 Ill. 208; *Alden Coal Co. v. Challis*, 200 Ill. 222; *Corning v. Woolner*, 206 Ill. 190.

94—*Rose v. Elizabethtown*, 275 Ill. 167; *Russell v. Lincoln*, 200 Ill. 511.

95—*Dewey v. Chicago*, 274 Ill. 268; *Augusta v. Tyner*, 197 Ill. 242; *Kimball v. Chicago*, 253 Ill. 105.

96—*Alden Coal Co. v. Challis*, 200 Ill. 222; *Owen v. Brookport*, 208 Ill. 35.

97—*Littler v. Lincoln*, 106 Ill. 353.

lic the burden of keeping the highway in repair and a liability for failure to do so.⁹⁸

The mere extension of the limits of a municipality so as to include a platted subdivision of land does not amount to an acceptance by the municipality of the dedication of streets and passageways shown upon the plat of the subdivision. The municipality still has the right to elect what streets shown on the plat should become public highways and public charges upon the municipality with reference to their maintenance.⁹⁹

§ 1735. Filing Plat an Offer to Dedicate Property to Public Use—Where an owner of ground plats the same and places the plat on record and he indicates thereon, by proper name and description, the streets, alleys and public grounds, or by any proper designation clearly indicates upon such plat that portions thereof are set aside and intended for a specific public use, such plat, though not in conformity with the statute, will be deemed an offer on the owner's part to dedicate to public use the portion shown on the plat to have been set aside for the use of the public.

If, however, all that appears on the face of the plat is a blank space, and there is nothing to show that the land covered by the blank space has been dedicated to a public use, it cannot be held, from the face of the plat alone, that the owner intended, by making and recording the plat, to devote the premises represented by the blank space upon the plat to the public use.¹

Whether the owner of land has dedicated it to a municipality for the purposes of a street or highway, is simply a question of intention, and the question of intention must be determined by all the circumstances which surround the transaction.

The fencing out of a strip of land by the owner affords

98—*Augusta v. Tyner*, 197 Ill. 242.

99—*Russell v. Chicago & M. E. Ry.*

Co., 205 Ill. 155; *Venice v. Madison*
C. F. Co., 216 Ill. 345.

1—*Birge v. Centralia*, 218 Ill. 503;

Grube v. Nichols, 36 Ill. 92; *Wheat-*
field v. Grundemann, 164 Ill. 250.

strong evidence of its being left for a highway, and without contravening evidence, must be accepted as satisfactory evidence of its dedication.

A sale of property adjoining a highway, and the description of it in a deed as being bounded by the highway, are circumstances going to show an intention to dedicate the land embraced in the strip for the purposes of a highway, because it becomes necessary for the purchaser to whom the land is sold to use the strip as a highway.²

§ 1736. **An Offer to Dedicate** must be made before it can be accepted. In a controversy involving the question whether a certain alley was a public or private alley, it was stated: "There can be no acceptance of an offer where there is no offer. If a statutory plat showing this alley upon it, had been executed and filed by the owner or owners of the property, or, if a plan not executed according to the statute, had been filed by the owners, or if the owners had made declarations, or done any act indicating an intention to dedicate the property, the circumstances referred to would be important as showing whether or not the city accepted such dedication or any offer of the same. But as there is no evidence in the record of a user of the alley by the city, or by the public for the purpose of passage and re-passage, these circumstances, unaccompanied by such user, are not sufficient to establish ownership of the alley in the city, or fix its character as a public alley."³

§ 1737. **Acceptance of a Part of a Dedication**—There seems to be some little confusion in the authorities as to the effect where the municipality accepts a part of a dedication, whether by accepting a part it accepts the whole and is entitled to the benefits of the entire dedication and responsible for the care and protection thereof. But the true rule seems to be stated in the case of *Dewey v. Chicago*, 274 Ill. 268, where it is said: "It is now well estab-

²—*Woodburn v. Sterling*, 184 Ill. 208.

³—*Chicago v. Borden*, 190 Ill. 431.

lished law in this State that where the city accepts the most important streets of an addition and the major part of them, and has evinced no intention to refuse to accept any of them it will be deemed to have accepted all of the streets and alleys of the addition."⁴ (Citing *Kimball v. Chicago*, 253 Ill. 105; *Lee v. Harris*, 206 Ill. 428.) There are a number of authorities which seem to hold that the acceptance of a part of a dedication does not amount to an acceptance of the whole.⁵

It is true that a street may be accepted in part and the remainder rejected, if it is proven that such was the intention of the public authorities. An acceptance of some of the streets named in a plat will not constitute an acceptance of the whole, if it be shown that there was an intention to limit the acceptance.⁶

§ 1738. Description of the Premises Dedicated for Public Purposes—To make a good dedication, either under the statute or at the common law, requires a definite and certain description of what is proposed to be dedicated. It is the plat or map made out, acknowledged and recorded in conformity with the statute which constitutes a conveyance vesting the fee simple title in the municipality. An instrument of conveyance ought, upon its face, show at least enough to enable a competent surveyor to find, with absolute certainty, that which is assumed to be conveyed.

And where the proof fails to show a sufficient offer to dedicate any definite quantity, it is not sufficient to show a common law dedication.⁷

Where all that appears on the face of the plat is a blank space, and there is nothing to show that the land covered by such blank space has been devoted to a public use, it cannot be held, from the face of the plat alone, that the owner intended by the making and recording of the plat to de-

⁴—*Dewey v. Chicago*, 274 Ill. 268.

⁶—*Kimball v. Chicago*, 253 Ill. 105.

⁵—*Chicago v. Drexel*, 141 Ill. 89;

⁷—*Winnetka v. Prouty*, 107 Ill. 218.

Jordan v. Chenoa, 166 Ill. 530.

vote the premises represented by the blank space upon the plat to a public use. No presumption that the owner intended to deprive himself of his land can be relied upon to explain an ambiguity or uncertainty.⁸

The words "Public Square" written on a map or plat of a subdivision of land is a clear indication that the square is dedicated as a public square and is to be used by the public for some public purpose. The purpose may be indicated by proof of custom or long usage, but these words do not indicate any certain or definite use of the square in the absence of such proof, and certainly not for the definite use of maintaining thereon a county jail.⁹

§ 1739. Revocation of Offer to Dedicate Land for Public Purposes—The authorities seem to be clear that to render a dedication complete and effectual, it must be accepted by the public; so before such acceptance it is a mere offer to dedicate which the owner may, if the rights of third parties have not intervened, withdraw at any time; in case he does so, the title to the proposed streets and public places either reverts to him, or is considered as always being in him.¹⁰

But if an acceptance by the public of such an offer, or where the original proprietor has sold lots in the subdivision, an attempt to vacate the plat, or a portion of it, or otherwise to attempt to withdraw such offer to dedicate is of no avail.¹¹

After it has once been accepted by the public a dedication is irrevocable except with the consent of the public and of those persons who have vested rights in such dedication.¹²

8—*Birge v. Centralia*, 218 Ill. 503; *Falter v. Packard*, 219 Ill. 356; *Grube v. Nichols*, 36 Ill. 92; *Wheatfield v. Grundmann*, 164 Ill. 250.

9—*Dunne v. Rock Island County*, 273 Ill. 53.

10—*Lee v. Mound Station*, 118 Ill. 304; *Chicago v. Drexel*, 141 Ill. 89; *Woodburn v. Sterling*, 184 Ill. 208;

Reichert M. Co. v. Frieberg, 217 Ill. 384.

11—*Lee v. Mound Station*, 118 Ill. 304; *Lee v. Harris*, 206 Ill. 428; *Thompson v. Maloney*, 199 Ill. 276; *Russell v. Lincoln*, 200 Ill. 511; *Woodburn v. Sterling*, 184 Ill. 208.

12—*Rose v. Elizabethtown*, 275 Ill. 167.

An acceptance of a dedication of a street must be held to have been made in view of the facts as they existed at the time of the acceptance; so, if it appear that prior to the acceptance a portion of the premises proposed to be dedicated had been withdrawn from the offer to dedicate, the public acquired no right in the portion so withdrawn.¹³

It has been held that a conveyance of the land by the original proprietor is in law a revocation of his offer to dedicate such land to the public for the purposes of a street, and that no acceptance of the dedication by the public authorities subsequent to such conveyance can be of any avail.¹⁴

If no acceptance of the street is shown by the municipality prior to the execution and recording of the deed of vacation, the offer to dedicate contained in the recorded plat is withdrawn, and the municipality cannot accept the offer to dedicate subsequent to the recording of the deed of vacation. Provided, however, that the deed of vacation is valid.¹⁵

What constitutes a revocation of an offer to dedicate depends very largely upon the circumstances of the particular case, and is usually a question of fact. It may be shown, before the acceptance, by acts inconsistent with the public use to which the land was offered to be dedicated or by enclosing the land so as to exclude the public use, or by erecting buildings upon the land offered to be dedicated, as by the conveyance of the property offered to be dedicated.¹⁶

The court seems to draw a distinction between a statutory dedication and a common law dedication in regard to the withdrawal of the offer of dedication. If the plat is a statutory plat the offer could only be withdrawn by a vaca-

13—*Hewes v. Crete*, 68 Ill. App. 305.

14—*Chicago v. Drexel*, 141 Ill. 89.

15—*Reichert M. Co. v. Freeburg*, 217 Ill. 384.

16—*Rose v. Elizabethtown*, 275 Ill. 167.

tion of the plat under the statute, but if it is a common law plat the offer to dedicate might be otherwise withdrawn before acceptance.¹⁷

It is held by the act of executing and acknowledging a vacation piece a party recognizes and treats the plat as a statutory plat. The statutory provisions for vacating a dedication are not applicable to a common law dedication.¹⁸

§ 1740. Evidence of Revocation—A revocation may be shown to have been made by different modes. It may be done by express notice; by such acts as are inconsistent with the enjoyment of the right; by obstructing the land proposed as dedicated; by the sale of the land without reservation. In all such cases a revocation will be intended. And it may be shown by a deed of revocation.¹⁹

An offer to dedicate is revoked by implication, by the death of the party making the offer before its acceptance by the public authorities.²⁰

§ 1741. Distinction Between Statutory and Common Law Dedications—The difference between a statutory and common law dedication is, that the former vests the legal title to the ground set apart for public purposes in the municipality, in trust for the public, while the latter leaves the title in the plattor, charged, however, with the same rights and interests in the public for its use by the public, which it would have if the fee was in the corporation.²¹

Where a plat made by the Canal Commissioners, not being acknowledged as provided by the statute of 1833, did not, of itself, convey the title to a public square to the public as provided by that statute; but by an amendatory act of 1841, it was provided that all sales made by the

17—Kimball v. Chicago, 253 Ill. 105.

18—Corbin v. Baltimore & O. and Chicago T. R. R. Co., 285 Ill. 439.

19—Forbes v. Balenseifer, 74 Ill. 183; Lee v. Mound Station, 118 Ill. 304.

20—People v. Johnson, 237 Ill. 237.

21—Chicago, R. I. & P. R. R. Co. v. Joliet, 79 Ill. 25; Maywood Co. v. Maywood, 118 Ill. 61; Ryerson v. Chicago, 247 Ill. 185; Owen v. Brookport, 208 Ill. 35.

county commissioners were confirmed and ratified and declared to be good both in law and equity.²²

A deputy surveyor, acting in his own name, and not that of his principal, in making a survey and plat of a subdivision under the statute of 1845, does not bind his principal, nor make his act that of the county surveyor, and such a subdivision does not constitute a statutory dedication of the streets to the municipality.²³

Where, however, the proprietors of the ground lay out into streets and alleys, properly made and recorded it, but neglected to acknowledge the plat, it was held that the fact of so making such plat and dividing the land into blocks, lots, streets and alleys, and recording it, was of itself a dedication to the public use of streets and alleys, and whether it was a statutory or common law dedication was wholly immaterial so far as the public were concerned, provided the dedication had been accepted by the municipality.²⁴

§ 1742. Fee in the Streets of the Original Town of Chicago; Fractional Section 15 Addition; Fort Dearborn Addition; and Town of La Salle—Distinction Between Official and Private Plats—In the case of *Chicago v. Rumsey*, 87 Ill. 348, the Supreme Court draws a distinction between plats made by private persons and those by the state or officers of the state which do not conform to the requirements of the statute, so as to convey the fee of the land indicated thereon as streets.

The property involved in the case, owned by Rumsey, fronted on La Salle Street, in the original Town of Chicago. The land had by Act of Congress been conveyed to the State of Illinois to aid in opening a canal to unite the waters of Illinois River to those of Lake Michigan, and the General Assembly had by an Act passed in 1836 made it the

22—*Lyman v. Gedney*, 114 Ill. 388.

24—*Powell v. Gilman*, 38 Ill. App.

23—*Wilder v. Aurora, D. & R. E.* 611.

T. Co., 216 Ill. 493.

duty of the Board of Commissioners of the Illinois and Michigan Canal to examine the whole route, and select such places thereon as may be eligible for town sites, and cause the same to be laid off into town lots.

The plat of the Town of Chicago was made by the Canal Commissioners and duly filed for record, but it failed to comply with the general statute in regard to town plats of 1833. And the point was made that thus failing to so comply with the statute of 1833, it did not convey the fee of the street to the town, but the fee still remained in the owner of the adjoining property.

In quite a labored argument Mr. Justice Scholfield undertakes to elucidate the distinction above mentioned, and says:

“Had the land, where the town is laid out, belonged to a party other than the state; or, possibly, had the legal title been conveyed to a trustee or trustees for the use of the state, the point would have been well made. But, as we have seen, the land where these lots were laid off belonged to the state. The legal title was not held in the name of a trustee, but by the state; and the lots were conveyed by patent issuing from the chief executive officer of the state—in all material respects similar to patents conveying land from the general government.

“The statute of 1833 (Rev. Stat. of 1833, p. 599), embracing almost every conceivable authority, other than states, by which a town or an addition thereto can be laid out, and enjoins, by severe penalties, conformity to its provisions. But the state is not included in its provisions, and there is no need that it should be. Being sovereign, and being capable of action in that respect only through its law-making power, in determining to lay out a town or an addition thereto, the law by which it is caused to be done must necessarily prescribe what shall constitute such laying out.

“But the statute of 1833 has one very important bearing upon the question. It shows that it was the policy of

the state to so vest the fee of streets in cities, towns, etc., that it should be under the paramount control of the legislature, for the public use, divested of all claims of private ownership. This being the policy of the state the presumption would follow that no discrimination in this regard should exist between cities, towns, etc., laid out by the state and those laid out by other proprietors—and it would require clear and satisfactory proof that the state intended to vest a private ownership in the soil under the streets in cities and towns laid out by it, to induce the belief that it was actually designed to accomplish that purpose. A general policy being once established it devolves upon those claiming exemptions to clearly show their existence. No reason is perceived why an exception should have been desirable, which would have left the legislature with less unquestionable authority to control the improvement of the streets for public purposes in the cities, towns, etc., of which the state is proprietor, than in others—and the circumstances connected with the sale and conveyance of the canal lots have no tendency to prove that such exemption was intended. The commissioners had no authority given them by law to sell anything but lots, where towns are laid out; and the patent issued by the Governor could only include what the commissioners sold.

“As has been seen by reference to (certain authorities) it is but a presumption that a conveyance of a lot bounded by a street or highway, carries the title in the underlying soil to the center, which may be rebutted by circumstances; and, therefore, since the circumstances are inconsistent with the presumption, it cannot prevail.

“We do not regard it of any practicable importance whether it is more technically accurate to say the fee of this street is in the state, or in the city. If it shall be said to be in the corporation, there can be no pretense for saying that it is in it otherwise than as an agency—a mere creature of the state—existing only by the authority of the

legislature, and, at all times, under its paramount supervision and control, and if it should be said to be in the state, it can only be said to be there for the purpose of holding for a street for the city—and in either case the sole purpose and end to be obtained is precisely the same—the holding it for the use of a street of the city for the benefit of the public—not the citizens of the city alone, but the entire public of which the legislature is the representative. There could, therefore, be no necessity of any formal act of dedication of the fee; it was already as completely under the paramount authority and control of the legislature as it could possibly be for the purposes of a street, and no conveyance or formal act of dedication by the state to the municipality, could invest it with a more exclusive interest in or control over the street than was done by the act of the legislature directing it to be laid out as such. Cities, towns, etc., possess and can only exercise such authority and control in regard to their streets as may be delegated by the legislature. They have no inherent authority in this respect and can act only in subordination to the paramount authority of the legislature. If we could see that it was at all material, we should say that the act of the legislature directing the laying out of the streets on its own land, was a sufficient dedication of the fee to the local municipality.

“It follows that the fee of the street being so held, private owners have no more right to complain of improvements made thereon by the city under the authority of the legislature than of improvements made in streets, the fee of which is vested in the city by an act of dedication in conformity with the provisions of the statute of 1833; and that which might lawfully be done by the city under the authority of the legislature, notwithstanding its effect on adjacent property owners, in the one case, might also be done in the other; so that there can be no different measure of liability in that regard.”²⁵

The plat of Fractional Section 15 Addition to Chicago was made by the Canal Commissioners on June 13, 1836, pursuant to an Act of the General Assembly, approved January 9, 1836. (Laws 1836, p. 145.) Section 33 of that act directed the commissioners to lay off and subdivide section 15 into town lots, streets and alleys as their best judgment would best promote the best interest of the canal fund, but the act contained no further provision regarding such subdivision. The effect of any of such subdivision upon the title to the streets was not declared, but was left to be determined by existing rules. The statute under which the subdivision was made did not purport to affect the title to the streets, and did not direct that any plat thereof should be made and recorded. The only statute then in force in regard to plats was that of February 27, 1833 (Laws 1833, p. 599), which provided that a plat made out, certified, acknowledged and recorded as required by the act should be deemed in law and in equity, a sufficient conveyance to vest the fee simple of all lands marked on such plat as donated or granted to the public for the use and purposes intended. The making of a plat at common law did not convey the fee to the streets. It could have that effect as a conveyance only by virtue of the statute.

The plat made by the Canal Commissioners did not conform to the statute of 1833 in regard to subdividing and platting property and ordinarily such a plat would not convey the fee to the streets to the municipality. But in the case of *Chicago v. Rumsey*, 87 Ill. 348, a plat made by the same commissioners under the same law of the Original Town of Chicago, it was held that the fee of the streets therein was conveyed to the city. And in speaking of the *Rumsey* case the court says: "The *Rumsey* case has, however, been cited with approval in many subsequent decisions, and has been regarded as holding that plats made by the canal commissioners have the same effect as statutory plats under the statute of 1833. That decision has become a rule of property which has been relied on for many years

and which we should not disregard. In the case of Fractional Section 15 Addition to Chicago the situation is precisely the same as in the Original Town of Chicago. This subdivision was made by the Canal Commissioners, and although we do not think the doctrine of the Rumsey case should be extended beyond its precise facts, no distinction exists which furnishes a reason for refusing to apply it to the Fractional Section 15 Addition as well as to the Original Town of Chicago. We are, therefore, constrained to hold that the title of the appellant is limited to the lot lines and does not extend to the center of the street adjoining his premises."²⁶

In the case of the United States v. Illinois Cent. Railroad Co., 154 U. S. 225, the question of where lies the fee of the streets, alleys and public grounds dedicated by the plat of Fort Dearborn Addition to Chicago was before the court, and it was there held that the plat of Fort Dearborn Addition was made in substantial compliance with the statutes of Illinois then in force, and that it vested in the City of Chicago the fee of the streets, alleys and public grounds designated on the plat as completely as if made by an unconditional conveyance in the ordinary form. This decision of the United States court has been recognized by the Supreme Court of Illinois as determining the title in the streets, alleys and public grounds in that addition in numerous cases.²⁷

In the case of the Union Coal Co. v. La Salle, 136 Ill. 119, it appeared that the territory included in the city was originally platted by the Canal Trustees, then the holders of the legal title, in accordance with the provisions of the statutes, so as to vest, under the statutes the title in fee simple in the city that the coal company had, without any title or authority, mined coal from under the streets of the city, and the city had sued the company in trespass there-

²⁶—Ryerson v. Chicago, 247 Ill. 185.

²⁷—Williams v. Chicago, 247 Ill. 240.

for. And the proper question submitted was one of law whether the court properly found the defendant guilty on the facts established. In this regard the court says:

“By our statute, the acknowledgment and recording of a plat by the owner of lands within the city, by which such lands are subdivided and platted into blocks, lots, streets, alleys, public squares, etc., is declared to operate, both at law and in equity, to a conveyance in fee by the owner to the city of such portions of the lands platted as are embraced within the streets, alleys and other grounds dedicated to the use of the public, and it is provided the lands embraced within such streets, alleys and other public places shall be held by the city in its corporate name in trust for the uses and purposes set forth and intended by the plat.

“It results from this provision of the statute, that the legal title to the streets and alleys in question in this suit is vested in the City of La Salle, in trust for the use of the public for the purposes of streets and alleys.

“The trust thus vested in the city is not a mere dry or passive trust, but one in the execution of which the city has and holds the possession, control, management and supervision of the trust property. It is the duty of the trustee to defend and protect the title of the trust estate, and as the legal title is in him he alone can sue and be sued in a court of law.

“That the entry of the defendant upon the strata of coal underlying the streets of La Salle, and mining coal therefrom was a trespass cannot admit of a doubt.”²⁸

From this decision it is to be gathered that where a plat and subdivision of land is made and recorded in pursuance with the provisions of the statute the fee of the streets and public grounds which passes thereby to the municipality is a fee simple absolute, for all purposes, and the common law rule in regard thereto, that the ownership thereof in-

28—Union Coal Co. v. LaSalle, 136
Ill. 119.

cludes from the center of the earth to the heavens above prevails completely, although the conveyance may be for a particular purpose or upon a particular trust.²⁹

§ 1743. Dedication Includes the Surface and All Above and Beneath—The dedication of a piece of ground for a public use includes not only the surface of the ground so dedicated, but also all above and below it.³⁰

§ 1744. Dedication and Acceptance a Question of Fact—Whether or not there has been a dedication by the owner for a public purpose is a question of fact to be answered by the jury.³¹

Whether or not there was an intention on the part of the owner of the land to dedicate it for the purposes of a highway, and whether or not there was an acceptance of the dedication by the public, are questions which are to be determined by a jury, under proper instructions from the court.³²

§ 1745. Evidence of Dedication and Acceptance Should Be Certain—To make a sufficient dedication of land to a public use the owner of the soil must devote it to such public use, and it must be accepted and recognized as such by the public authorities; the acts of both the donor and the public authorities should be unequivocal and satisfactory of the design to dedicate on the one hand and to accept and to appropriate to a public use on the other.³³

Where there is nothing on the face of the plat, or in the certificate of the surveyor, or in the acknowledgment to indicate what the figures appearing on the plat were indicate or intended to represent the meaning of such figures must

29—Sears v. Chicago, 247 Ill. 204.

30—Field v. Barling, 149 Ill. 556;
LaSalle v. Matthewson & H. Z. Co.,
117 Ill. 411.

31—Maltman v. Chicago, M. & St.
P. R. R. Co., 41 Ill. App. 229.

32—Woodburn v. Sterling, 184 Ill.
208.

33—Grube v. Nichols, 36 Ill. 92;

Trustees First Evan Church v. Walsh,
57 Ill. 363; Kyle v. Logan, 87 Ill.
64; Chicago v. Drexel, 141 Ill. 89;
Waggeman v. N. Peoria, 155 Ill. 545.

be left to conjecture, and there is neither a statutory nor common law dedication of the land claimed for a public purpose.³⁴

And where the plat fails to designate a strip of land as a street or highway and nothing appears apart therefrom, their form, location and dimensions to indicate the purpose for which such strips were laid out, it cannot be concluded that they were intended for streets.³⁵

But where it is clear from the face of the plat that the strips of land on all sides of the platted lots are intended to and does constitute streets, the strip of land in question is to be and regarded as intended to constitute a street by the proprietor of the plat.³⁶

On the other hand, if it appears from an inspection of the plat that the proprietor did not intend to dedicate a certain portion of the land for the purpose of a public street, the land will be held not to constitute a public street. The extent of a dedication on a map or plat is to be determined from a consideration of the whole instrument, since the chief object is to ascertain the intention of the donor.³⁷

In order to show an intention to dedicate a strip of land to the use of the public as a street it is not necessary that the strip should be named as a street, as such intention may be established in any conceivable way by which it may be made manifest that it was intended to set said strip aside as a public street.³⁸

So far as the public are concerned, unless the offer to dedicate is withdrawn, the street may be opened and used at the discretion of the public officers, as the public necessities may require, and it is not necessary to an acceptance that every street should be forthwith opened.³⁹

And where the land is platted as a public park, and that

34—*Winnetka v. Prouty*, 107 Ill. 218; *Eckhart v. Irons*, 128 Ill. 568.

35—*Chicago v. Drexel*, 141 Ill. 89.

36—*Thompson v. Maloney*, 199 Ill. 276.

37—*Guttery v. Glenn*, 201 Ill. 275.

38—*Ingraham v. Brown*, 231 Ill. 256.

39—*Augusta v. Tyner*, 197 Ill. 242.

the inhabitants of the village actually enjoyed that use, in such a way and for such a time, as that the public accommodation and private rights would be materially affected by an interruption of their enjoyment, it is sufficient that the owner assented to its use as a public park.⁴⁰

In a certain case it was contended that a strip of land in a plat was not dedicated to the municipality as an alley because the said strip was not marked or designated upon the plat as an alley; but it was replied by the court that it was clear from the plat that the strip, though not marked as such on the plat by the word "alley" was intended by the platator to be dedicated to the municipality as an alley. The plat showed the strip to be 16 feet wide and the street lines where they intersected said strip did not cross the said strip—that is, the strip at each street intersection is left open and connects directly with the streets so that travel can pass from either of the three streets of the said subdivision without crossing any line or lines upon said plat which would indicate an intention on the part of the platator to connect said strip with each of the street intersections in said plat and to indicate that the strip had been left open as an alley as plainly as though the strip with the word "alley" upon the plat.

It is said that in numerous cases in the Supreme Court it has been held that in order to show an intention to dedicate a strip of land for the use of the public as a street it is not essential that the strip be designated upon the plat as a street, if, upon consideration of the entire plat, there is manifested an intention to dedicate a strip as a street. A survey and plat alone are sufficient to establish a dedication, if it is evident from the face of the plat that it was the intention of the proprietor to set apart certain grounds for public use.⁴¹

Acquiescence, with knowledge of use by the public, with-

40—Maywood Co. v. Maywood, 118 Ill. 61.

41—Kimball v. Chicago, 253 Ill. 105; Thompson v. Maloney, 199 Ill.

out objection, is not conclusive evidence of a dedication, for it may be rebutted. The owner might show any act which would overcome the presumption.⁴²

The voluntary use of a way by the public, and the assent of the owner of the soil, may not of itself be sufficient to make it a public highway, and impose upon the proper public authorities the duty of repair; but when they are connected with proof of its actual recognition and repair by the proper public authorities, and the whole facts go to the jury, they might be warranted in finding from such use by the public, acquiescence of the owner, and recognition and repair by the proper authorities, that the way is a public highway in the full sense of that term.⁴³

Whether there was an intention to dedicate is to be determined upon the consideration of the evidence of the land owner as to his intention together with his acts and conduct. His testimony as to his intention will not prevail against unequivocal acts and conduct, inconsistent with his intent as testified to, if the public rely and act on his acts. The public may rely on that which the owner has done as indicating his intent, and if his conduct has been such as to lead an ordinarily discreet and thoughtful man to infer an intention to make a dedication, and the public rely on such acts as a dedication and accept the same for public use, and use it as a public road the dedication becomes complete and cannot be recalled by the owner.⁴⁴

§ 1746. Dedication Established by Prescription—Dedication may be established by proof of a use by the public, with the acquiescence of the owner, for a period of twenty years, and, according to some authorities, by even a less period. A setting out of land by the owner for a highway, evidenced by such acts as show a clear intent on his part to

276; *Smith v. Flora*, 64 Ill. 93; *Godfrey v. Alton*, 12 Ill. 29; *Ingraham v. Brown*, 231 Ill. 256.

42—*Kyle v. Logan*, 87 Ill. 64.

43—*Alvord v. Ashley*, 17 Ill. 363.

44—*Seidschlag v. Antioch*, 207 Ill. 280.

dedicate it, and an acceptance thereof by the public and a user thereof for highway purposes, will amount to a complete dedication, binding on all parties. When there is a question of dedication, and the acts of the owner are shown, the question whether he intended to dedicate the property for the purposes of a highway, is one of fact, which must be answered by the jury, from the evidence, and not by the court, and this is particularly true where there is a conflict of evidence as to what the acts of the owner were, and when such acts occurred.⁴⁵

But in order to justify a claim that the title to land has been divested by dedication, the proof should be very satisfactory, either of an actual intention to dedicate, or of such acts and declarations as should equitably estop the owner from denying such intention. The intention of the party must govern as to a dedication, and if of a public highway, it must be by the owner of the title to the ground. The owner of the land must do some act, or suffer some act to be done, from which it can fairly be inferred he intended a dedication to the public.

§1747. Presumptive Right Not Conclusive—The presumption arising from the use for twenty years is not, however, conclusive. It may be rebutted by showing facts to overcome the presumption.⁴⁶

To make a sufficient dedication the owner of the soil must devote the right of way to public use, and it must be accepted and appropriated by the public to that use by travel, and a recognition as a public highway by the proper authorities, by repairs or otherwise. When a dedication is relied upon to establish the right, the acts of both the donor and the public authorities should be unequivocal and satisfactory of a design to dedicate on the one part and an acceptance and appropriation on the other.⁴⁷

45—*Maltman v. Chicago, M. & St. P. R. R. Co.*, 41 Ill. App. 229; *Peyton v. Shaw*, 15 Ill. App. 192.

46—*Peyton v. Shaw*, 15 Ill. App. 192.

47—*Grube v. Nichols*, 36 Ill. 92.

In order to justify the holding that the title has been divested by dedication the proof should be very satisfactory, either of an actual intention to dedicate, or of such acts or declarations as should equitably estop the owner from denying such intention. So where ditches were dug and the street thrown open without the knowledge of the owner while he was out of the State, and he could not prevent the public from using the road, it was held that he was not estopped from denying a dedication.⁴⁸

And where the record fails to show that clear and satisfactory evidence of an intention on the part of an owner to dedicate the land to a public use that the authorities require, no dedication will be presumed. So where the owner set his fence one rod within the line of his land, but testifies that when he did so it was with no intention to dedicate it to the public for a road, but it was for a temporary purpose, it was held that such act did not amount to a dedication.⁴⁹

The vital and controlling principle in a common law dedication is the *animus donandi*; and where there is no manifest intent on the part of the owner of the soil, either by formal dedication, or by such acts as should equitably estop him from denying such intention, to donate the land to the use of the public it cannot be said there was a valid dedication. A dedication is not an act of omission to assert a right, but it is the affirmative act of the donor, resulting from an action, and not a passive condition of the owner's mind on the subject. A mere non-assertion of a right does not establish a dedication, unless circumstances establish the purpose or intention to donate the use to the public.

In order to establish a way by prescription, the use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and which the knowledge and acquiescence of the owner of the land, in or over which the easement is claimed. Where

48—*Kelly v. Chicago*, 48 Ill. 388.

49—*McIntyre v. Story*, 80 Ill. 127.

the use is by mere permission, only and not adverse, there is no basis upon which a right of way by prescription can rest.

Where there has been a user of a highway for a prescribed statutory period, a presumption arises from such user, that there has been a grant of a highway. This presumption may, however, be rebutted by testimony. And such presumption is rebutted when it is shown that the grant was a grant of a private and not of a public alley. A mere permissive use of a way laid out as a private alley will not, of itself, transform it into a public alley; no matter how long this permissive use by the public has continued, in order to constitute a public alley there must be a dedication and an acceptance thereof by the public authorities.⁵⁰

§ 1748. Equitable Estoppel Against the Public—It is well settled that the Statute of Limitations does not run against a municipal corporation in respect to property held for public use. Municipal authorities cannot grant a street for any purpose inconsistent with the public use. In the cases sustaining the right of one who has trespassed upon a public street to retain the possession so taken there has been some element other than the mere possession by which his right was sustained; and the conditions have been such that it was necessary to estop the municipality to prevent an injustice or wrong. The doctrine of equitable estoppel may be applied to municipal corporations where justice and right may require it; but where there are no permanent improvements on the part of the street taken but only a few rose bushes and a cherry tree, it was held that the trespasser, although he had had possession for more than twenty years, suffered no substantial injury, and he was not entitled to an injunction restraining the municipality from taking possession of the strip of land.⁵¹

There is a conflict among the authorities whether the

50—Chicago v. Borden, 190 Ill. 430.

51—Sullivan v. Tichenor, 179 Ill. 97.

rights of a municipality or of the public may be lost by non-user, adverse possession. There are cases which hold that the public may lose their right to streets or public places by long continued adverse possession by private individuals; and the principle of *estoppel in pais* is applied in such cases, as this leaves the courts to decide the question, not by mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may appear.⁵²

So where expensive structures have been erected upon the premises claimed by the municipality as public property, by the permission of the public authorities, the doctrine of *estoppel in pais* should be applied.⁵³

Where the public authorities have for a long space of time withheld asserting authority over streets, and private parties have been, by the acts of those representing the public, induced to believe the street to be abandoned by the public, and on the faith of that belief, and with the acquiescence of those representing the public, they have placed themselves, by making structures or improvements in the street, in a situation where they must suffer great pecuniary loss if thereafter those representing the public be allowed to allege that the street is not abandoned, the doctrine of equitable estoppel may be applied against such public authorities.⁵⁴

In order to create an equitable estoppel as against the public something more than the mere possession of the street on the part of private parties must be shown.⁵⁵

So a maple tree, a vine, a few shrubs and an inexpensive fence are not such improvements as will prevent the municipality from recovering possession of a portion of a street by way of estoppel.⁵⁶

52—Chicago, R. I. & P. R. R. Co. v. Joliet, 79 Ill. 25. v. Joliet, 79 Ill. 26; Lee v. Mound Station, 118 Ill. 304; Winnetka v.

53—Chicago & N. W. Ry. Co. v. Prouty, 107 Ill. 218. 55—Shirk v. Chicago, 195 Ill. 298.

54—Chicago, R. I. & P. R. R. Co. 56—DeKalb v. Luney, 193 Ill. 185.

Where a party leases a portion of a street from a city he is estopped from denying that the portion so leased is a public street, although he may have erected expensive structures upon it.⁵⁷

§ 1749. Vacation of the Entire Plat by Owner—Statute—“Any such plat may be vacated by the owner of the premises at any time before the sale of any lot therein by a written instrument declaring the same to be vacated, executed, acknowledged or proved and recorded in like manner as deeds of lands; which declaration being duly recorded shall operate to destroy the force and effect of the record of the plat so vacated, and to divest all public rights in the streets, alleys and public grounds, and all dedications laid out or described in such plat. When lots have been sold the plat may be vacated in the manner herein provided by all the owners of the lots in such plat joining in the execution of such writing.”⁵⁸

The conditions prescribed for the vacation of a plat by the owner are, simply, first, that the vacation shall be before any lots are sold, and, second, if any lots are sold all the owners of lots in such plat shall join in the deed of vacation. An attempted vacation of a portion of a plat, including streets and alleys, by a party platting the same or his grantee, has no effect, where prior thereto, the original owner has sold lots in the subdivision, unless his vendee also join in the vacation.⁵⁹

Since the foregoing was written, on February 20, 1918, there was filed in the Supreme Court in the case of *Illinois Western Electric Co. v. Town of Cicero*, 282 Ill. 468, an opinion which seems to be at variance with a number of decisions previously rendered; in order that its force may be appreciated liberal extracts must be taken from the opinion.

“This is an appeal taken by the town of Cicero from a

57—*Eisendrath v. Chicago*, 192 Ill. 320.

58—Sec. 6, Ch. 109, R. S.

59—*Lee v. Harris*, 206 Ill. 428.

decree of the Circuit Court of Cook County enjoining said town from improving with pavement and combination curb and gutter a portion of a street in said town known as Twenty-second Place. The bill was filed by the appellee, the Illinois Western Electric Company, against the town of Cicero and the R. F. Conway Company, which company had contracted to do the work, and the hearing was had on the bill, answer and an agreed statement of facts.

"The agreed facts set up in the decree are substantially as follows: March 16, 1904, Edgar A. White, being the owner in fee simple of the northwest quarter of the northeast quarter of the northeast quarter of section 28 of township 39 north, range 13 east of the third principal meridian in said town of Cicero, platted said premises into blocks and lots and showing on said plat certain streets and alleys, which plat was filed in the recorder's office of Cook County. September 23, 1908, White and wife conveyed all the property shown on the plat to William P. Sidley, who thereafter while the owner of all the property embraced in the plat, caused a plat to be made and recorded, changing the width of certain of the lots shown in the White plat, but in no other way affecting or changing the former plat. January 23, 1915, Sidley and wife conveyed to the Western Electric Company all the premises embraced in the aforementioned plats, which company on January 25, 1915, being the sole owner of the premises, executed a deed of vacation of the premises shown by the White and Sidley plats and filed the same for record in the recorder's office of Cook County March 27, 1915. November 18, 1915, the name of the Western Electric Company was changed to the Illinois Western Electric Company, the present name of the appellee corporation. April 21, 1916, appellant, the town of Cicero, filed its petition in the County Court of Cook County for the purpose of levying a special assessment to pay the cost of improving with a pavement and combination curb and gutter a portion of West Twenty-second place or street,

together with other streets not here included. The petition showed the appellee as the owner of all the lots abutting the portion of Twenty-second place between South Forty-ninth avenue and South Fiftieth avenue, being the portion of the street here involved, and asked that the same be assessed for said improvement. A hearing was had on the petition and a judgment of confirmation was entered against said property for making said improvement. March 2, 1917, appellant contracted for making said improvement with R. F. Conway & Company, which company, on May 2, 1917, entered upon the street and excavated about 980 feet thereof for the purpose of installing a curb and gutter, at a cost to the company of about \$700. It also appears that subsequent to the filing of the White plat of the premises involved, and prior to the filing of the deed of vacation by the appellee declaring said street to be vacated, there had been installed in said street as public improvements and paid for by special assessments upon the property abutting the street, water pipes in 1905, which are now a system of water pipes in the town of Cicero; a tile-pipe sewer in 1905, which forms a part of a system of sewers in the town of Cicero; water service pipes in 1907; tile house drains and house connections in 1908; cement sidewalks on both sides of Twenty-second place. The White plat embraced the premises now owned by the appellee, consisting of two blocks divided into lots. The blocks are bounded by Riverside parkway on the north, South Forty-ninth avenue on the east, Twenty-third street on the south and South Fiftieth avenue on the west. The two blocks are separated by West Twenty-second place, a street running east and west and which is the street here in controversy. It is agreed that all the streets surrounding the two blocks were fully improved, except that one was not paved prior to January 25, 1915, the date the instrument vacating the plat was filed; that West Twenty-second place (the street here involved) had for ten years prior to the filing of the bill of complaint

by appellee been traveled to some extent by the general public and that Twenty-second place was paved from South Fiftieth avenue (the street bounding on the west the property shown by the plats) to the west line of the town of Cicero, a distance of about one and a half miles.

“It is the contention of the appellant, the town of Cicero, that prior to January 25, 1915, when the appellee filed in the recorder’s office of Cook County a written instrument vacating the plats of the premises then of record, there had been a complete acceptance of West Twenty-second place by the town of Cicero and by the public and under the law appellee, although the owner of the property embraced in said plat, could not by any means vacate the same and thus deprive the public of the use of the streets therein designated, or, as stated in his brief: ‘It would be contrary to public policy to declare the street in question the private property of the dedicator after the municipality, under the statutory dedication, had exercised its corporate power over the same by placing various public improvements therein, under proper legal proceedings, prior to the attempted vacation thereof by the owner of the lots.’

“The prayer of the bill was for, and the relief granted was an injunction to restrain the appellant and the Conway Company from entering upon certain property that had formerly constituted West Twenty-second place, between South Forty-ninth and South Fiftieth avenues, in the town of Cicero, and there construct a certain street improvement; the relief prayed for and granted did not affect any of the other streets in the White and Sidley plats, nor did affect any of the improvements previously constructed on West Twenty-second place, but the decree gave the appellant the right to enter upon the property at all reasonable times for the purpose of renewing and repairing the improvements which had previously been constructed therein. The sole question, therefore, is the right of the appellee to stop the construction of the proposed new street improve-

ment upon what was formerly West Twenty-second place after the statutory plat creating the street had been duly vacated, notwithstanding the fact that the municipality had accepted the plat by constructing in the street various public improvements and notwithstanding the public had used the street for some extent for some ten years." The court then cites sections 6 and 7 of chapter 109 R. S. in regard to the vacation of plats, which are cited herein and then proceeds: "Appellee, at the time it filed its instrument of vacation in the office of the recorder of deeds, was the owner of all the premises in the White and Sidley plats, and the effect of its action is controlled by the provisions of section 6 above set out. That section in clear, explicit and unequivocal terms, provides that when the owner of all the premises embraced in a plat of record desires to vacate the same he may do so in the manner there provided and the vacation of such plat shall operate 'To divest all public rights in the streets, alleys and public grounds.'

"Section 6 is applicable to and controlling of the vacation here involved. It plainly defines the manner of vacating a plat by the owner or owners of the premises embraced therein and makes no mention of any concurrent action on the part of the municipality. Appellant insists that the city had accepted the dedication of the street shown by the plat and that the public had secured rights therein before the attempted vacation, and that these rights of the public could not be divested. Section 6 answers this by expressly stating that a vacation of a plat does 'divest all public rights in the streets.' Only rights once vested can be divested. Nothing can be plainer than this provision and no argument could make it plainer. There is no need or occasion for construction."

The court then cites a number of cases in which the construction of section 7 was involved, and then continues:

"We find nothing in the cases called to our attention which is controlling of the question presented in this case or

which construes or explains the meaning of section 6, which as said before, to us seems plain. We have referred to such authorities because they are much relied upon and discussed in briefs of counsel, and for the further reason that they or some of them treat of section 6 in connection with section 7, which was the controlling section in each of these cases.

"Appellant insists that the effect and meaning we have given to section 6 is contrary to public policy, because it would permit the removal of public improvements now in said street. As we have before said, the language of the statute is not ambiguous and is not open to construction. In plain terms it says the instrument of vacation shall operate to destroy the force and effect of the plat 'and to divest all public rights in the streets, alleys and public grounds, and all dedications laid out or described in such plat.' A court cannot say that the legislature did not mean what in plain language it said was its intention. It is not claimed giving section 6 the effect we have given it would violate any constitutional provision. If the enforcement of the statute results in evil consequences the remedy must be in the legislature."⁶⁶

Substantially the same principle was held in the case of *Corbin v. Baltimore & O. Chicago Terminal R. R. Co.*, 285 Ill. 439.

The decree of the Circuit Court of Cook County having been adverse to the Town of Cicero, and the uncertainty of the decision of the Supreme Court in the case, and the disastrous results which might result to municipalities in case the decree of the Circuit Court should be sustained, doubtless induced the General Assembly to take action in the matter. On June 22, 1917, the following amendment was adopted to section 6, aforesaid; it undoubtedly enables

⁶⁶—*Lee v. Harris*, 206 Ill. 428;
*Illinois Western Electric Co. v. Town
of Cicero*, 282 Ill. 468.

municipalities to protect themselves against the divesture of improvements which might be placed on such streets and highways before the vacation thereof: "Any such plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument, to which a copy of such plat shall be attached, declaring the same to be vacated. Such instrument shall be approved by the city council or village or county board (as the case may be) in like manner as plats of subdivisions. Such council or board may reject such instrument which abridges or destroys any public right in any of its streets or alleys. Such instrument shall be executed, acknowledged or proved, and recorded in like manner as plats of subdivisions, and being duly recorded shall operate to destroy the force and effect of the record of the plat so vacated, and to divest all public rights in the streets, alleys and public grounds, and dedications laid out or described in such plat. When lots have been sold, the plat may be vacated in the manner herein provided by all the owners of lots in such plat joining in the execution of such writing."⁶¹

Where the statute provides that the proprietors of platted tracts may vacate the entire tract, or any portion thereof, at any time before the sale of a single lot therein, and after the sale of a lot or lots therein, the vacation may be had by all the owners of lots therein joining with the proprietor in the vacation, such provision does not authorize the proprietor, after he has sold a portion of the property, to vacate a portion of the plat without the parties to whom he has sold lots therein joining in such vacation, although the part of the plat proposed to be vacated is not connected with the lots sold, except by cross streets. The owners of the lots sold have an interest in keeping the public ways, shown on the plat, open, and it is presumed that such public ways give an added value to all the lots on the plat. It is fair to presume that the purchaser of a lot paid an addi-

61—*Laws of 1917*, p. 642.

tional value for his lot on that account, and the party making the plat ought not, therefore, to be permitted to take away such added value by revoking part of his dedication, without the consent of his vendees.

And if the proprietor attempts to vacate a portion of his plat, after the sale of lots therein, such attempted vacation is void.⁶²

The death of the owner of a common law plat operates as a revocation of the offer to dedicate the streets and public places described in the plat, if such death occurs before the acceptance thereof by the public.⁶³

§ 1750. Vacation of Part of Plat—Statute—“Any part of a plat may be vacated in the manner provided in the preceding section, and subject to the conditions therein prescribed: Provided, such vacation shall not abridge or destroy any of the rights or privileges of other proprietors in such plat; and provided, further, that nothing contained in this section shall authorize the closing or obstruction of any public highway laid out according to law.”⁶⁴

The sections of the statute in regard to the vacation of a plat, or a part of a plat, by the owner or owners does not require the concurrence or joint action of the city council in cities or boards of trustees in towns or villages, with such owner or owners; but it allows him or them, of his or their own volition alone, subject to the conditions and qualifications mentioned therein, to vacate the plat or part of the plat by his or their deed of that fact.⁶⁵

In vacating a part of a plat the meaning of the statute is, that any part of a plat may be vacated by the owner of such part before any lots therein are sold, or, after the lots are sold, by all the owners of such part joining in the deed of vacation; so it was held that the owner of certain lots

62—*Saunders v. Chicago*, 212 Ill. 206.

63—*Rose v. Elizabethtown*, 275 Ill. 167.

64—Sec. 7, Ch. 109, R. S.

65—*Littler v. Lincoln*, 106 Ill. 353.

in a subdivision might not only vacate the subdivision as to such lots, but also the street in front of them, provided the same had not been accepted and used by the public as a highway.⁶⁶

The vacation of a plat by the owner has nothing to do with streets laid out by municipal authority, and it forms no impediment to the future laying out of a street across the territory affected—it simply has the effect of withdrawing the proposed dedication.

A deed vacating a plat, or part of a plat, reciting that the party executing it is the owner of all the premises therein mentioned, is, *prima facie*, evidence of that fact. It is not required that a deed of vacation shall exhibit the title, nor recite how the party executing it became the sole owner.⁶⁷

Section 7 of Chapter 109, R. S., authorizes the vacation of part of a plat by the owner in the manner prescribed in section 6, provided the vacation does not abridge or destroy the rights or privileges of other proprietors in such plat, and it is further provided that nothing in the section shall authorize closing or obstructing any public highway laid out according to law. The owner of territory within the part of the plat sought to be vacated, had authority to execute a deed of vacation if it did not violate the rights of other proprietors of the plat, and the vacation did not close or obstruct any public highway laid out according to law. The rights and privileges of other proprietors in the plat which the statute protects are necessarily legal rights and privileges, and such parties cannot, therefore, be affected by the closing of streets not adjacent to their property nor directly affording access thereto and egress therefrom.⁶⁸

§ 1751. **Vacations of Streets and Highways by Public Authority—Statute**—“No city council of any city, or board

⁶⁶—*Chicago Anderson P. B. Co. v. Chicago*, 138 Ill. 628.

⁶⁷—*Littler v. Lincoln*, 106 Ill. 353.

⁶⁸—*Sheldon v. Rockford & I. Ry. Co.*, 238 Ill. 576.

of trustees of any village or town, whether incorporated by special act or under any general law, shall have power to vacate or close any street or alley, or any portion of the same, except upon three-fourth majority of all the aldermen of the city or trustees of the village or town authorized by law to be elected; such vote to be taken by ayes and nays, and entered upon the records of the council or board. And when property is damaged by the vacation or closing of any street or alley, the same shall be ascertained as authorized by law."⁶⁹

An ordinance passed by the municipal authorities is void if the record fails to show that it was passed in accordance to the provisions of the statute in regard to the vacation of streets and alleys.⁷⁰

Section 31 of the chapter on Roads and Bridges, in regard to counties under township organization, gives the commissioners of highways power to vacate any road when petitioned by a number of land owners, not less than twelve, or two-thirds of the land owners residing in the town within two miles of the road to be vacated. And section 35 provides that if the petition is simply for the vacation of the road, and the commissioners or a majority of them shall, at such meeting, decide that the prayer of the petitioners should be granted, they shall order such road to be vacated; a copy of such order, together with the petition, shall then be filed with the town clerk; such order to be so filed within five days after the date of such decision.⁷¹

In counties not under township organization, the commissioners of highways are also given powers to vacate roads when petitioned so to do by any number of land owners, not less than twelve, residing in the district and within three miles of the road to be vacated.⁷²

The provision for the filing of a copy of the order of vaca-

69—Sec. 1, Ch. 145, R. S.

70—*Thomas v. Metz*, 236 Ill. 86.

71—Secs. 31, 35, Ch. 121, R. S.

72—Sec. 203, Ch. 121, R. S.

tion and petition is similar to section 35 ante, except that it must be filed with the district clerk.⁷³

The right to vacate a street is to be exercised only when the municipal authorities, in the exercise of their discretion, determine that the street is no longer required for the public use or convenience. The grant of power to municipal authorities to vacate streets and highways is to be construed in view of the purpose for which the municipality is invested with the control of its streets and public grounds. The municipality in this respect is a trustee for the general public, and holds them for the use for which they were dedicated; so an ordinance to vacate a portion of a street for the use of private parties, or that private parties may have the use of the portion vacated was held to be *ultra vires*. *Smith v. McDowell*, 148 Ill. 51. The municipal authorities have no power to grant to a private person the permanent use of a street or public grounds, or any portion of it, for a private use.⁷⁴

But it by no means follows that an obstruction in a street is illegal. Thus the necessary and temporary obstruction incident to the use and repair of a street, and the interruption that may be caused by the temporary depositing of earth or other material in improving the adjoining property, must be borne as a reasonable and necessary limitation of the free and uninterrupted right of use by the public of such highways when made under proper regulations and reasonable safeguards.⁷⁵

The right of the municipal authorities to vacate a street or highway is not limited to the fact that the street so proposed to be vacated, was originally opened by condemnation proceedings in which certain property owners were assessed and paid a large sum to pay for the street so taken in such proceeding. The payment of a special assessment does not give the party so paying a special property right in the

73—Sec. 207, Ch. 121, R. S.

75—*Smith v. McDowell*, 148 Ill.

74—*Field v. Barling*, 149 Ill. 556. 51.

property condemned for a street, and he cannot, on that account, maintain a bill to enjoin the vacation of the street by the municipal authorities.⁷⁶

It can make no difference, as to the power of a municipality to vacate a street, whether the fee remains in the city, reverts to the original dedicator, or passes by operation of law to the adjoining owners; nor will the fact that after the vacation the use of a street passes to a private individual or corporation necessarily render it an exercise of power for a private and not for a public purpose. The vacation of a street by the city council is not a diversion to another use of property dedicated for a special purpose; the city simply abandons the public easement or right of passage, leaving to the law to determine in whom the fee of such street, and the right to use the same, reverts; and leaving the property owner who claims to have been specially damaged by such vacation, his right of action to recover.⁷⁷

This statute has no reference to a vacation of a plat by the owner, but relates exclusively to the vacation of streets and alleys by municipal authorities.⁷⁸

The rule declared in this State when land is subdivided and platted into lots, blocks, streets and alleys as an addition to a city or village, and the plat has been recorded but has not been acknowledged in the manner required by the statute, or otherwise fails to comply with the requirements of the statute, is, that there is no statutory dedication but a common law dedication is effected, and if the lots so platted are sold, the dedication of the streets and alleys shown on the plat is irrevocable by the proprietor alone; and the purchasers of the lots have the right to have the streets thrown open for use forever. And this principle is not limited in its application to the single street on which the lot is situated.

76—*Chicago v. Union Building Assn.*, 102 Ill. 379.

77—*Parker v. Catholic Bishop of Chicago*, 41 Ill. App. 74.

78—*Littler v. Lincoln*, 106 Ill. 353.

If the owner of land lays out and establishes a town, and makes and exhibits a plat thereof with various plats of spare ground such as streets, alleys, quays, etc., and sells lots with a clear reference to such plan, the purchasers of the lots acquire as appurtenant to their lots every easement, privilege and advantage which the plan represents as belonging to them as a part of the town, or to their owners as citizens of the town. And the right thus passing to the purchasers is not the mere right that the purchasers may use the streets or other public places according to their appropriate purpose, but a right vests in the purchasers that all persons whatever, as their occasion may require or invite, may so use them.

In other words, the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers that the streets and other public places indicated on the plat shall be forever open for the use of the public free from all claim or interference by the proprietor inconsistent with such use.⁷⁹

In the case of *Saunders v. Chicago*, 212 Ill. 206, the right of a proprietor to vacate a plat made by him, under the provisions of the act of 1847, came under consideration. That act provided that such proprietor might "at any time before making sale of any single lot or lots, by executing a writing and causing the same to be recorded in the office in which the plat or map was recorded, declare such map or plat to be vacated; and the execution and recording of such writing shall operate to destroy the force and effect of the recording of the plat or map so vacated, and divest all public rights in the streets, alleys, commons and public grounds laid down or described in such plat or map; and in case any single lot or lots have been sold, the plat or map may be vacated as herein provided, by all owners of the lots joining in the execution of the writing aforesaid: Provided, that no

79—*Saunders v. Chicago*, 212 Ill. 206; *Earl v. Chicago*, 136 Ill. 277; *Russell v. Lincoln*, 200 Ill. 511.

such writing shall be recorded until the execution thereof shall have been acknowledged or proved as is or may be required in respect to deeds.⁸⁰

“Any part of a plat or map of a town, addition or subdivision may be vacated under the provisions and subject to the conditions herein contained.”⁸¹

The proprietor of a plat having sold certain lots in the subdivision attempted to vacate a portion of the plat by signing and recording a writing like that described in the statute, but in which his vendee did not join, and the question arose as to the validity of such vacation. It is assumed in the decision of the case that the plat was a statutory subdivision.

It was held that the right to vacate a plat or any portion thereof was governed by statute then in force, which was the said act of 1847, that neither the whole or any part of a statutory plat can be vacated except in compliance with the provisions of the statute authorizing plats or portions of plats to be vacated, and that a proprietor of a plat has no sole power of vacation after he has invested others, as owners of lots, with an interest in the plat. But the power to vacate a plat under such circumstances resided jointly in the proprietor and the owner of any lot or lots in the subdivision.

Any other construction would give the proprietor of the plat the sole right to vacate and close up all the streets and any part of the plat in which he owned all of the lots, without regard to the effect of such closing of the streets and alleys on the property of those who had bought lots from the proprietor in the view of and on the faith of the arrangement or system of streets and alleys as set forth on the plat. The true construction recognizes the interest and right of every lot owner in the vacation of any of the streets and alleys on the plat, and requires that the vacation of the plat or a part of the plat can only be accomplished by the joint action of the proprietor and the owners of lots in the plat.

80—Sec. 1, Laws 1847, p. 166.

81—Sec. 3, Laws 1847, p. 166.

Lots are sold by the proprietor of the plat, and purchased by the purchasers, in view of the system of streets and alleys shown on the plat. The value of a lot depends not only from the fact that it abuts on a street, but also from the fact that such street connects with other streets, and such other streets with still other streets.

A lot has its value in the eyes of the proprietor as seller and the intended purchaser, in a substantial degree, on the plan and system of the streets and alleys. No one would purchase a lot in a plat if the proprietor retained the right to vacate all of the plat, but the lot sold and the street in front of it. If the owner who has sold lots may at his own pleasure select the part of the plat in which no lots have been sold and vacate such parts of the plat he may vacate all parts of the plat except what he has sold, and that would be to hold that he possessed power to vacate the whole of the plat except such portion which he has sold—a power which section 1 expressly denies him.

One who purchases a lot has an interest in every part of the plat of which his lot is a part, and, aside from the plain meaning of the act, it is clear it could not have been the legislative intent that a proprietor should be allowed to make a plat of his land showing thereon portions of the land set apart for the use of the purchaser of lots and the public as public streets and alleys, and to sell lots with reference to such plat and with reference to the advantages of the streets and alleys shown on the plat, and afterwards, at solely his own pleasure and without the assent of the persons to whom he had sold lots, vacate all parts of the plat in which he had sold no lots, together with all the streets and alleys on such part to be vacated, and thereby become the private owner of the streets and alleys which he had represented by his plat were to be kept open for the public use and for the benefit of the owners of lots in the plat.⁸²

⁸²—Saunders v. Chicago, 212 Ill.
206.

In the case of *Saunders v. Chicago*, the Supreme Court was called upon to consider the cases of *Littler v. Lincoln*, 106 Ill. 353, and *Chicago Pressed Brick Co. v. Chicago*, 138 Ill. 628.

It was stated that the statute of 1847 was in force when the vacation was attempted to be made in the *Saunders* case, but that statute was repealed by the act of 1874, and sections 6 and 7 of that act relate to the vacation of plats and parts of plats. These two sections were in force when the plats were made involved in *Little* and *Pressed Brick Co.* cases. In these cases section 6 and 7 aforesaid were construed to authorize a part of a plat to be vacated by the owner of the plat, if the owner was the proprietor of all the lots in the part of the plat proposed to be vacated. The phraseology of sections 6 and 7 of the act of 1874 and sections 1 and 3 of the act of 1847 is not the same. The right of a proprietor to vacate a part of a plat under the provisions of the act of 1847 was not involved in those cases or either of them.

There was a dissenting opinion filed by three of the judges of the Supreme Court to the decision in the *Saunders* case, and it might be well to refer thereto; it is said that in the case of *Littler v. Lincoln*, 106 Ill. 353, it was decided that any part of a statutory plat might be vacated by the owner before the sale of any lot in the part vacated and without the joint concurrence of the municipal authorities subject only to the restrictions mentioned in the statute then in force. That decision was followed and confirmed in the case of *Chicago Pressed Brick Co. v. Chicago*, 138 Ill. 628. "As we understand it, the opinion of the court in this case does not question the correctness of those decisions, but takes a contrary position on the ground that the phraseology of the act of 1874 is not the same as that of the act of 1847. No difference whatever is pointed out, and clearly there is none which would justify a different interpretation of the two acts. It is true that precisely the

same words are not used in each; but the only difference is that under the act of 1874 the right of the proprietor is more limited than in the previous act. Each provides for the vacation of a part of the plat, and the only difference is that the act of 1874 restricts, to some extent, the right of the owner to make the vacation, by two provisos. Instead of enlarging the right of the owner to vacate a part of the plat before the sale of any lot in such part, the act of 1874 purports to limit such right by provisions that the vacation shall not abridge or destroy any rights or privileges of other proprietors in the plat, and that act shall not authorize the closing or obstruction of any highway laid out according to law. The only difference, therefore, between the two acts is against the conclusion reached in this case." 83

This Saunders case is one of recent determination and the opinions give evidence that it received careful attention at the hands of the court, and being the last deliverance of the court it may properly be considered as determining the state of the law on this subject notwithstanding its apparent conflict with the former decisions of the court.

§ 1752. General Rule in Regard to Vacating Streets and Highways—From a consideration of the foregoing statutes, and the decisions of the courts in regard thereto, a general rule in regard to the vacation of streets and highways may be stated as follows: (1) Where the question arises between the public authorities and private persons it would seem that such public authorities may legally vacate such streets and highways when they are no longer needed for a public purpose, and the adjoining owner may not object unless he has suffered some injury peculiar to himself, such as being deprived of access to his lot. (2) But such public authorities may not vacate a street or highway simply to favor a single individual or to accomplish a private pur-

83—Saunders v. Chicago, 212 Ill.
206.

pose. (3) An original proprietor may vacate a street in a subdivision made by him, if he does so before he has sold any lots in the subdivision. (4) If the original proprietor has sold lots in the subdivision then a street or highway can only be voluntarily vacated by all the owners of lots joining in a deed of vacation. (5) A street or highway in a part of a subdivision may be vacated in such part by the proprietor thereof, provided the other proprietors in the subdivision do not object thereto. (6) When the question of the vacation of a street or highway arises between private parties such street or highway may not be vacated by an adjoining proprietor, if any other proprietor in the subdivision objects thereto, although access and egress to and from his lot may not be affected thereby.

§ 1753. Cancelling Plat of Record—Statute—"When any plat, or part of a plat, is vacated, the recorder in whose office the plat is recorded shall, upon the record of such vacation, write in plain letters across the plat or part so vacated, the word 'vacated' and shall make a reference on the same of the volume and page in which the instrument of vacation is recorded." ⁸⁴

§ 1754. Plat of Highways Made and Recorded—Statute—"Whenever any highway, road, street, alley, public ground, toll-road, railroad, or canal is laid out, located, opened, widened or extended, or the location thereof altered, it shall be the duty of the commissioners, authorities, officers, persons or corporations, public or private, laying out, locating, opening, widening, extending or altering the same, to cause a plat thereof, showing the width, courses and extent thereof, and making such reference to known and established corners or monuments that the location thereof may be ascertained, to be made and recorded in the office of the recorder of the county in which the premises taken or used for the same, or any part thereof, are situated, within six months after such highway, road, street, alley, public

⁸⁴—Sec. 8, Ch. 109, R. S.

road, toll-road, railroad, or canal is laid out, located, opened, widened, extended or the location thereof altered, and when any highway, road, street, alley, public grounds, toll-road, railroad or canal is vacated, the order, ordinance or other declaration vacating the same shall be in like manner recorded. This act shall not be construed to alter or affect any law specifically providing for the recording of such plat, or to require the same to be recorded sooner than is specifically provided; except that any requirements of the record of such plat in any other place than is provided herein shall not exempt the parties from complying with this act. Whoever shall refuse or neglect to comply with this section shall be fined \$25, and a like sum for every month he shall continue such refusal or neglect after conviction thereof, to be recovered before a justice of the peace of the county, in the name of the county, one-half to the use of the county and the other half to the use of the person complaining.”⁸⁵

§ 1755. Prosecuting Offenders Against the Statute—Statute—“Whenever it shall come to the knowledge of the recorder of deeds of any county that any of the provisions of this act have been violated, it shall be his duty to notify the State’s Attorney of the fact, and the State’s Attorney shall immediately institute suit, and prosecute the same to final judgment against the person offending.”⁸⁶

§ 1756. Plats to Be Approved by Corporate Authorities—Statute—“It shall be unlawful for any recorder to record any map, plat or subdivision of lands situated in any incorporated city, town or village until the same shall be approved by the legislative authority of the city, town or village in which such land may be situated, or by some city, town or village officer for that purpose designated by resolution or ordinance of said legislative authority. For each and every violation of this section by any recorder or his deputy or employee, such recorder shall forfeit and pay to the county the sum of \$200 to be recovered in any court of

85—Sec. 9, Ch. 109, R. S.

86—Sec. 10, Ch. 109, R. S.

competent jurisdiction, in the name of the county, for the use of the county, in an action of debt, with cost of suit.”⁸⁷

It is also provided, by the city and village act, that the city council or board of trustees shall have power to provide by ordinance that any map, plat or subdivision of any block, lot, subplot or part thereof, or of any piece or parcel of land, shall be submitted to the city council or board of trustees, or to some officer to be designated by such council or board of trustees, for their or his approval, and in such case no such map, plat or subdivision shall be entitled to record in the proper county or have any validity until it shall have been so approved.⁸⁸

§ 1757. Abandonment of Public Property by Public Authorities—It is well recognized that the public may lose or forfeit its rights to streets, highways or public grounds by an abandonment of them.⁸⁹

In order to constitute an abandonment, however, there must be not only an apparent abandonment by the public, but an intention to abandon must be established by evidence; so it has been held that the adverse possession of a portion of a street, no matter how long continued, has no effect, by reason of the statutes of limitation to bar the right of the municipality to be restored to the possession of the street to its full width.⁹⁰

But it is also said that where the evidence fails to show an acceptance by the public authorities, and it is shown that the land in controversy has been enclosed with the adjoining property for a number of years, this is sufficient to show an abandonment by the public which would preclude the opening of the supposed street by the public authorities.⁹¹

And it has also been held that the mere non-user of public grounds for twenty years affords a presumption of the

87—Sec. 14, Ch. 115, R. S.

88—Sec. 179, Ch. 24, R. S.—City and Village Act.

89—*Auburn v. Goodwin*, 128 Ill. 57.

90—*Dekalb v. Luney*, 193 Ill. 185;

Shirk v. Chicago, 195 Ill. 298; *Lee v. Harris*, 206 Ill. 428.

91—*Winnetka v. Prouty*, 107 Ill. 218.

extinguishment, though not a strong one, of the rights of a municipality to public grounds; so if there has been done in the meantime some act by the owner of the adjacent land or by the owner of the land charged with an easement, inconsistent with, or adverse to the right claimed by the municipality an abandonment will be presumed.⁹²

As when the owner of the adjoining land has fenced in a street, platted according to the common law, and used the same for more than twenty years, a bill may be maintained by him to enjoin the municipality from interfering with his rights to use it.⁹³

And under such circumstances a bill will not lie by the municipality to enjoin the obstruction of a street or highway.⁹⁴

§ 1758. Various Views of Rights of Adjoining Owners—

In considering the rights of owners of lands adjoining streets, highways and other public grounds, they may, with reference to the statutes and decisions under them, be viewed from various standpoints: (1) their rights and title to such streets and public grounds whether the dedication by statute or at common law; (2) their rights on the vacation of such streets and public grounds either by the public authorities or by the proprietors or original dedicators.

It is somewhat difficult to harmonize the decisions on this subject. At first view they seem to be conflicting; but a line of demarcation is drawn in them, though sometimes it is not very distinct.

§ 1759. Rights of Adjoining Owners Under Statutory Dedications—The statute provides that where a plat is executed, acknowledged and recorded in pursuance to its provisions, it shall be deemed to be a conveyance of the fee simple of such portions as are marked thereon as donated or granted to the public; the decisions under this statute so

92—*Peoria v. Johnson*, 56 Ill. 45; 210; *Hewes v. Crete*, 68 Ill. App. Auburn v. Goodwin, 128 Ill. 57. 305.

93—*Vermont v. Miller*, 161 Ill. 94—*Jordan v. Chenoa*, 166 Ill. 530.

hold; so the fee being in the public, or the representative of the public, for its use, a conveyance of a lot in a statutory subdivision does not convey to the grantee of the platlor any title to the street in front of the lot; he takes no interest in the street except in common with the public.⁹⁵

§ 1760. Effect of Vacation of Public Grounds by Municipalities—Rights of Adjoining Owners—Statute—“When any street, alley, lane or highway, or any part thereof, has been or shall be vacated under or by virtue of any act of this State, or by the order of the city council of any city or the trustees of any village or town, or by the commissioners of highways, county board or other authority authorized to vacate the same, *the land or lot immediately adjoining on either side shall extend to the center line of such street, alley, lane, or highway, or part thereof so vacated*, unless otherwise specially provided in the act, ordinance or order vacating the same, or unless in consequence of more of the land for such street, alley, lane or highway having been contributed from the land on one side thereof than the other, such subdivision is inequitable, in which case the street, alley, lane or highway so vacated shall be divided according to the equities of the adjoining owners.”⁹⁶

§ 1761. Constitutionality of the Act Extending the Rights of Adjoining Owners on the Vacation of Streets, Questioned—There is serious doubt as to the constitutionality of this statute in regard to the provision therein extending the title of the adjoining owners to the center of the street on its vacation; it can apply only to statutory subdivisions of property, because the fee of the street always remains in the platlor, or his grantee, immediate or remote, in common law subdivisions.

But in statutory subdivisions the fee of the street is conveyed to the municipality for the purposes of a street, and there is always a possibility of a reverter in case the use

95—*Trustees v. Haven*, 11 Ill. 554.

96—Sec. 2, Ch. 145, R. S.

of the street or highway or other public places is vacated or abandoned by the municipality.

And while there is an undoubted power in the legislature to dispose of and control the property of municipalities, yet it may not, under the constitution, dispose of and control the private property or private rights of individuals.

The right of reverter arises upon the happening of a determination of the fee, or an abandonment of the purposes for which the property was conveyed. While this right of reverter is not property in the sense that it can be conveyed or sold on execution, because it results from a mere possibility, still it is a property right which appertains to the grantor or his heirs, and of which he or they can only be deprived by their voluntary act.⁹⁷

This feature of the statute was first enacted in 1865 (Laws of 1865, p. 130), and it may be held, as to subdivisions made subsequent thereto, to be a valid enactment under the principle so often announced that a deed made or an act done, is made or done with reference to the law in force at the time, and the grantor, or the party doing the act, is estopped from denying the validity of his act or claiming any benefit on account of the invalidity of his deed or act.

But it is a very dangerous principle to advance that the protection afforded by the great constitutional principle, that no man shall be deprived of life, liberty or property but by due process of law, can be abrogated merely by construction.

In the recent case of the Lockwood & Strickland Co. v. Chicago, 279 Ill. 445, this subject was incidentally considered. It appeared in that case that the city council of Chicago passed an ordinance providing that a certain alley therein named be vacated and closed, inasmuch as the said alley is no longer needed by the general public for use as

97—North v. Graham, 235 Ill. 178; 403; Sherman v. Jefferson, 274 Ill. Mott v. Danville Seminary, 129 Ill. 294.

an alley and the public interest will be subserved by the vacation thereof; but the vacation therein provided for was made upon the express condition that Lockwood & Strickland Co. shall within sixty days from the passage of the ordinance pay to the city of Chicago the sum of \$2,694, toward a fund for the payment of any and all damages which may arise from the vacation of the alley and on the further condition that the Lockwood & Strickland Co. file in the office of the recorder of deeds a certified copy of the ordinance.

The Lockwood & Strickland Co. complied with the conditions named in the ordinance by paying the money and filing the copy of the ordinance as required.

After the expiration of five years the Lockwood & Strickland Co. sued the city to recover the amount paid by it. The suit was in assumpsit, and the declaration alleged that the payment to the city was in the nature of a deposit to indemnify the city against any damages which might be recovered against it by private persons for damages resulting to private property by reason of the vacation of the alley; that no damages had been paid by the city by reason of such vacation and no suits had been brought against the city by reason of such vacation within five years from the date of the passage of the ordinance, and by reason of said facts the said city was liable to refund to the Lockwood & Strickland Co. the amount of money so deposited with it, which on demand it had refused to do.

The city insisted that by the terms of the ordinance the city agreed to and did vacate the alley in favor of the company for the consideration of \$2,694, and that the company was not entitled to recover the same. This contention was made by way of demurrer, which being sustained by the trial court the plaintiff elected to stand by its declaration and judgment was rendered in favor of the city. This judgment was affirmed by the Appellate Court, and the case was taken by appeal to the Supreme Court, on a certificate of importance.

In the body of the opinion it is said: A city may, in the lawful exercise of its discretion, vacate a street or alley, in which instance the fee to the same will revert either to the dedicator or to the owner of the adjoining land, dependent upon whether the city received the use of the street or alley by common law or statutory dedication. The ordinance does not purport to convey any interest to the appellant, and it would be beyond the power of the city to grant or convey to a private person or a corporation the ground embraced in a vacated street or alley. Whether the city owns the fee in an alley or merely an easement, when it is vacated, because no longer needed for public use, the law disposes of the reversionary interest and the reversionary rights cannot be granted or conveyed by the city. That the appellee had the power to vacate the alley and the power was lawfully exercised is not disputed. That the alley was no longer needed as a public alley is not contested. If the vacation of a street or alley causes damages to private property the municipality is liable for the same. If damages are not determined before the vacation of the street or alley the property owner may, at any time within the Statute of Limitations, sue for and recover the same. The city, where the damages are not ascertained in the manner required by law before the vacation, may demand and receive indemnity against damages before it vacates the street or alley.

To give the ordinance the construction contended for by the appellee and hold that it was a grant or conveyance by the city to the appellant of the vacated alley, and that the payment made was in consideration of the grant, would require holding that the ordinance did not mean what its language imported, which was lawful, but that it meant something entirely different, which was unlawful. The reasons for vacation of the alley as expressed in the ordinance were, that it was no longer needed by the general public for use as an alley, and that the public interest would be subserved

by its vacation. Appellant was required to pay, within sixty days, \$2,694, toward a fund for the payment of any and all damages which may arise from the vacation of the alley.

We are not impressed with the argument that the public interest was subserved by the receipt in the city treasury of the sum of \$2,694, for its action in vacating the alley. Whether the alley was no longer needed for public use and whether the public interest would be subserved by its vacation could not depend on how much the city would get for its action. The legislative power of the city must be exercised for the public benefit, but that does not authorize a municipality to sell or bargain legislation as a means of obtaining revenue. It would be a novel proposition to hold that a city, as a condition to the exercise of its lawful power and authority to vacate a street or alley no longer needed for public use, could demand and receive from private parties a sum of money for its action. Such a holding would be dangerous in principle, contrary to good morals and against public policy.

The time during which on sustaining damages against the city for the closing of the alley having expired the city has no longer any fear of such a proceeding, and is no longer liable. It follows that there is no longer any need of the indemnity deposited with the city by the appellant. This being so, it becomes the duty of the city to return the same to the appellant—and this in the absence of any express promise to do so. Such a promise will be implied. And the judgments of the Appellate and trial courts were reversed.⁹⁸

The early case of *Gebhardt v. Reeves*, 75 Ill. 301, decided before the law of 1865 was passed, may have some bearing on the questions here suggested and be worthy of consideration.

98—*Lockwood & Strickland Co. v. Chicago*, 279 Ill. 445.

It is there said: "The legal effect (of a statutory plat) is precisely the same as if he (the plattor) had made a direct conveyance to the corporation, in trust for the public. All interest in the estate that was in the owner becomes vested in the corporation. No limitation is fixed to the existence of the trust. It may endure forever. Until the municipality shall elect to abandon the use of the streets and alleys, the former owner has no interest whatever of the land embraced within them (the plats)—absolutely nothing within any definition of an estate or property, that he could sell or convey. It had all passed to the corporation by the former grant, subject only to the possibility that it might revert to him, if the contingency ever happened that the municipality should abandon the trust. Logically it follows, by the grant of the adjacent lot, the grantee takes no interest under his deed in the adjacent street or alley, other than what he acquires in common with the public. No authority is found, either in reason or justice, for the proposition that the fee in one piece of land, not mentioned in the deed, passes as appurtenant to another tract, granted by an accurate description, giving it a definite and limited boundary. The principle is, that the limits of his lot marked the boundary beyond which the title of the grantee does not extend. This is not like the title of an ordinary highway, or in case where an easement is acquired over a street in a mode other than by statutory dedication or direct conveyance. In such case the fee remains in the original proprietor, burdened with an easement in favor of the public, and will pass with the grant of the abutting premises. His conveyance by operation of law, carries the title to the center of the highway, as a part and parcel of the grant, if there be no words of limitation." It was further said that it was under the act of 1851 that the streets and alleys were vacated and that council misconceive the scope and effect of that act. "By its provisions the corporate authorities of the city were authorized, upon the petition of the property

owners, to vacate the streets, and convey, by quitclaim deed, any interest the city had in the streets, to the owners of the lots and lands next adjoining. The proposition relied on is, this law, in force when the plat was made, in some way made a contract for the plaintiff by which he, in effect, disclaimed, in favor of his grantee, all interest in the street, in case it should thereafter be vacated and agree that whatever interest the city may have had therein should be conveyed to the adjoining owner. Two answers to this suggest themselves. First: The city possessed no power to grant the fee in a public street or alley for private purposes, nor does the act in question purport to confer any such authority; it simply authorizes the city to release whatever interest in the street it could lawfully convey. Second: The fee the plaintiff had in the street and alley could not be divested and transferred to the adjoining lot owner by direct legislative action, nor could authority be given to any agency to do it for private purposes. An intention to take the property of one man and give it to another, without compensation, ought not to be attributed to the legislature, where a different motive may be assigned for its action. A law that would have that effect, or that would authorize it to be done, would be a palpable violation of the constitution as well as unjust.⁹⁹

§ 1762. Rights of Adjoining Owners Under Common Law Dedications—When a subdivision of land is made and recorded which does not comply with the statute it is held to be an offer by the proprietor to dedicate the streets and public grounds therein indicated for the uses and purposes shown on the plat, and, when the same have been accepted by the public authorities, such offer becomes a complete common law dedication. As the fee in the streets and public grounds only passes to the public by virtue of the statute, when a statutory subdivision is made, it necessarily follows that, in a common law dedication, the fee remains in the

⁹⁹—*Gebhardt v. Reeves*, 75 Ill. 301.

original proprietor, or his grantee, burdened with an easement in favor of the public.

If the original owner designates upon the plat of the premises a street, and subsequently sells lots with reference to such plat, as between him and his privies in estate and those buying lots upon the faith of such plat, or with reference thereto, there is an implied covenant that such designated streets or public ways shall be forever open for such ways and free from any interference by the original owner and those claiming under him, and it is sufficient to estop him, and those claiming under him, from denying or rescinding such dedication, whether it be accepted by the public authorities or not. And even if no special inconvenience or loss is shown the purchasers with reference to such plat are entitled, under the law, to demand that, as between them and the original proprietor, and those claiming under him, that the representations made by the plat, as to the public streets therein, shall not thereafter be impugned or held for naught, and he and they cannot afterwards vacate the same.¹

In cases of an ordinary highway, or where the town or city obtains a street or alley by dedication, or by condemnation under the power of eminent domain, or where urban property has been laid off and platted by the owner into lots, with streets and alleys intersecting each other, under circumstances under which a dedication may be inferred, or, indeed, in any mode except by what would be equivalent to a conveyance, only an easement is acquired by the municipality, the fee remaining in the owner or proprietor.

The fee of the street so remaining in the original owner or proprietor he may convey it; and a grant by the original owner of the premises abutting such street or highway, will, by operation of law, carry his title to the center of the highway as a part and parcel of the grant, if there be no other words limiting the grant.²

1—*Corning v. Woolner*, 206 Ill. 190.

2—*Gebhardt v. Reeves*, 75 Ill. 301; *Thomsen v. McCormick*, 136 Ill. 135;

In a deed in such case the intention to exclude the street from its operation must appear from the language of the deed, as explained by surrounding circumstances; where the premises are deeded by metes and bounds it will be presumed that the area of the street was not included, so as to give the grantee the fee of the street.³

One buying a lot abutting on a street in which the city has only an easement must be presumed to have purchased with knowledge of the fact that a conveyance of an abutting lot carries the title to the center of the street, subject only to the easement of the public therein. The abutting lot owner being thus the owner of the fee to the center of the street upon which his lot is located, has the right to make any reasonable use of the same which does not interfere with the reasonable enjoyment of the easement held for the use of the public.

It is unreasonable to say that such an abutting lot owner who owns the fee in the street, must pay the city for use of his property in a manner that in no way interferes with the full enjoyment of the easement.

Where the rights of a municipality in a street are acquired by condemnation, the fee, under the law, remains in the abutting land owner, to the center of the street.⁴

§ 1763. * * * Right of Adjoining Owner to Keep Street Open—When the question arises between private parties, that is, between the grantee of a lot or his grantee, and the original proprietor and his grantee, in the case of a common law dedication it is the right of the grantee of any one lot to have the street shown on the plat kept open forever; so it has been held in a number of cases that where the owner of land has made a plat, not in conformity with the statute, the streets and highways shown on such plat become common law dedications, and when he has sold lots and blocks

Thompson v. Maloney, 199 Ill. 276;
Owen v. Brookport, 208 Ill. 35; Wil-
der v. Aurora, D. & R. E. Ry. Co.,
216 Ill. 493.

3—Brewster v. Cahill, 199 Ill. 309;
Henderson v. Hatterman, 146 Ill. 555;
Corning v. Woolner, 206 Ill. 190.

4—Sears v. Chicago, 247 Ill. 204.

with reference to such plat the purchasers acquire, as appurtenances to their lots, every easement, privilege and advantage which the plan represents as belonging to them as a part of the plat; and the right thus passing to the purchasers is not a mere right that such purchasers may use the streets and other public places according to their appropriate purpose, but a right vesting in the purchasers that all persons whatever, as their occasion may require, or invite, may so use them. The sale and conveyance of such lots according to the plan of the plat imply a grant or covenant to the purchasers that the streets and other public places indicated upon the plat shall forever be open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use.⁵

There may be private rights in respect to streets, in a common law dedication, in grantees in conveyances made under a plat, although there may have been no complete dedication of the street to the public or an acceptance by the public officers of the proffered dedication.

In this connection it would be well to consider the case of *Chicago Anderson Press Brick Co. v. Chicago*, 138 Ill. 628. The form of the action and the object to be obtained is not stated in the case; but it was doubtless a bill by the appellant to enjoin the city from claiming authority over or occupying a strip of land claimed as a street. The complainant was the owner of two lots in a certain block in a subdivision of land, and as such executed and recorded a deed of vacation of such lots "and a strip of land thirty-three feet in width from north to south lying immediately south of and adjoining said lots." The deed also recited that the Brick Co. was also the owner of the land lying immediately south of and adjoining said strip of land, and that no other person was interested therein. No other person

5—*Earll v. Chicago*, 136 Ill. 277;
Clark v. McCormick, 174 Ill. 164;
Corning v. Woolner, 206 Ill. 190.

claimed rights under the dedication created by filing the plat and the only question submitted to the court was, as between the appellant and the appellee as to whether the deed of vacation vacated so much of the street as it assumed to vacate. The court proceeded to consider the provision of the statute concerning "Plats," quoting somewhat extensively and says: "The conditions prescribed by the preceding section are, simply, first, that the vacation shall be before any lots are sold; or, secondly, if any lots are sold, all the owners of lots in such plat shall join in the deed of vacation. And as a qualification of the language of section 7 the meaning is, clearly, any part of the plat may be vacated by the owner of such part before any lots are sold therein, or after lots are sold by all the lot owners in such part joining in the deed of vacation. Here the appellant is the owner of all the lots in the part claimed to be vacated, and so the conditions are complied with. * * *

The record clearly shows that there are no other proprietors in the plat * * * who can, in a legal sense, in any wise be affected by the withdrawal of this strip of land from public use. There is no public highway laid out according to law across the land the plat thereof assumed to be vacated by the appellant's deed of vacation. The words 'laid out according to law,' have a well known meaning according to our statutes, and they plainly imply the doing of those things by the proper local officers which are essential in the creation of a public highway, to authorize it to be worked and traveled, and especially the surveying, marking the courses and boundaries and ordering it established as a highway. The affirmative action of the public officers is indispensable in such case."

The opinion was written by Mr. Justice Schoefield, universally recognized as one of the most able jurists who ever sat on the supreme bench, and it is not to be lightly disregarded. If the case be confined simply to the controversy between the Brick Co. and the city, it may be a proper state-

ment of law. In support of his position the justice cites the cases of *Littler v. Lincoln*, 106 Ill. 367, *Chicago v. Union Building Association*, 102 Ill. 379, and *E. St. Louis v. O'Flynn*, 119 Ill. 200. Each of these authorities were controversies between the city authorities and individual proprietors. If the principles enunciated in this case be attempted to be extended beyond the question involved, so as to include controversies between individual proprietors and the owners of lots, then it is clearly in conflict with that class of cases represented by *Earll v. Chicago*, 136 Ill. 277, *Clark v. McCormick*, 174 Ill. 164, and *Corning v. Woolner*, 206 Ill. 190.

That a distinction is to be drawn in controversies between public authorities and private individuals, and in controversies between private individuals is clearly intimated in the case of *Ingraham v. Brown*, 231 Ill. 256, where it is said that the cases of *Chicago v. Drexel*, 141 Ill. 89, and *Birge v. Centralia*, 218 Ill. 503, were controversies which arose between the public authorities and private individuals, and not between two individuals as in the case of *Thompson v. Maloney*, 199 Ill. 275.

The rights which purchasers of lots in a subdivision, where the streets are dedicated under the common law, to have the streets kept open for public use is their private right, and if they are not parties to a litigation in which this right is involved they are not bound by it. The rights or privileges of proprietors of lots in a subdivision which the statute protects, are necessarily legal rights and privileges and such parties cannot, therefore, be affected by the vacation of a street by the municipal authorities which is not adjacent to their property nor directly affording access thereto or egress therefrom.⁶

But a somewhat contrary principle is stated in the following clause and citations, which it is believed to be the better expression of the law:

⁶—*Augusta v. Tyner*, 197 Ill. 242;
Littler v. Lincoln, 106 Ill. 353.

Every purchaser of a block in a subdivision is presumed to have bought in view of the system of streets and ways designed by the proprietor of the plat to provide ways of ingress and egress to and from the parts of the platted ground, not only for the use of the owners and occupants of the lots or blocks, but by all who might desire to pass along such streets and ways. The arrangement of the streets and ways forms a part of the consideration of the purchase of each block or part thereof, not only as to the original proprietor of the plat and those who purchase from him, but also as to all subsequent vendors and vendees. The original proprietor sold to his vendees the rights and privileges of the streets, and each subsequent vendor passed such rights to his vendee. The law implies mutual agreements between all such parties that the streets shall always remain open for use as platted.⁷

§ 1764. Right of Adjoining Owners to Light and Air—Where a strip of land has been dedicated as a public highway, the adjoining owner has the right to light and air from it. The column of light and air above the roadbed is as much a part of the highway as the roadbed itself. When cities and villages have been built along a public highway the right to light and air from it become vested, and even the legislature would have no more right to deprive an adjoining owner of it without compensation than they would to draw off the water from a navigable stream.

A city has no power to grant the use of a public highway to private parties so as to give them the exclusive use thereof to the exclusion of the public.⁸

7—Clark v. McCormick, 174 Ill. 164; Thompson v. Maloney, 199 Ill. 276.

8—Field v. Barling, 149 Ill. 556; Anisfield v. Grossman, 98 Ill. App. 180.

CHAPTER XVII

TITLE BY WILL

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§ 1770. **Introduction**—A will is one of the methods provided by law for the transfer of the title to real property, and it would seem proper that consideration should here be given to the subject. It cannot be expected, however, that in a work of this kind the great and extensive subject of wills, and titles derived from them, should be fully and completely exhausted herein. This great subject has been fully considered by many eminent jurists, whose works are worthy of careful perusal, and it would be an unnecessary piece of work to attempt to review them. But as by the statute of Illinois, wills are made a means of conveying real estate, and is one of the methods of procuring title by purchase, mentioned by Blackstone, this work would be incomplete without some consideration of the statute and decisions of the courts thereunder on this subject. In do-

ing this it may be necessary to consider the Ecclesiastical law to some extent.

§ 1771. Persons Who May Devise Property—Statute—

“Every male person of the age of twenty-one years, and every female of the age of eighteen years, being of sound mind and memory, shall have power to devise all the estate, right, title and interest, in possession, reversion or remainder, which he or she hath, or at the time of his or her death shall have, of, in and to any lands, tenements, hereditaments, annuities or rents, charged upon or issuing out of them, or goods and chattels, and personal estate of every description whatsoever, by will or testament.”¹

The statute has invested all persons of sound mind and memory, and of proper age, with power to dispose of their property by will, nor does it, in the slightest degree, undertake to say who shall be the objects of his bounty. In that he is left free to act as he may choose. He may dispose of his property as he likes, and to whom he prefers, even to the disinheritance of his children. And where the evidence shows that his mind was clear, and that he fully comprehended the nature, scope and effect of the will he makes, and no reason can be assigned why the courts should not carry it out.²

§ 1772. Descent and Devise of Property Controlled by Statute—In this State the descent of property, whether by inheritance or devise, is controlled by statute. The right to make a will and the right to take property under a will exists only by virtue of the statute of this state and are entirely subject to its provisions.³

§ 1773. Codicil Defined and Its Effect—A codicil to a will is something added to, or a qualification of, a will or testament.⁴

While the execution of a codicil operates as a republica-

1—Sec. 1, Ch. 148, R. S.

3—*Lewark v. Dodd*, 288 Ill. 80.

2—*Brownfield v. Wilson*, 78 Ill.

4—*Bouvier's Dic.*

tion of the will, yet a codicil does not operate to alter the original will except where so designated the true rule is that where a codicil makes no reference to a clause of the will creating a devise which has lapsed the republication of the will by the execution of such a codicil does not alter such clause of the will, nor create a new and different devise from that which has lapsed. The fact that a will is republished by the execution of a codicil by the testator and as republished contains a lapsed devise is not, of itself, sufficient to vest the title to the property described in the lapsed devise in the heir of the deceased devisee, where such devisee was given a fee.⁵

The generic term "will" includes codicils and legal provisions relating to wills must be understood as embracing codicils. A codicil duly attested is a will. Proof of a codicil, whether written on the same paper or on a separate paper, which codicil clearly and unmistakably refers to the will so as to preclude all doubt of its identity, establishes the will without further proof. Such is the rule in this State. It is held that the publication of a codicil is a republication of the will in the form it was at the time of the execution of the codicil and proof of the execution of the codicil establishes the will.⁶

§ 1774. Proper Execution of Will a Question of Law—Whether a will has been executed with all the proper formalities required by the statute is a question of law and not of fact to be considered by the jury.⁷

§ 1775. Manner of Making and Executing Wills—Probate—Statute—"All wills, testaments and codicils, by which any lands, tenements, hereditaments, annuities, rents or goods and chattels are devised, shall be in writing, and signed by the testator or testatrix, or by some one in his or her presence, and by his or her direction, and attested in

5—Dunn v. Kearney, 288 Ill. 49.

7—Johnson v. Johnson, 187 Ill. 86.

6—Newhall v. Newhall, 280 Ill. 199.

the presence of the testator or testatrix, by two or more credible witnesses, two of whom, declaring on oath or affirmation, before the county court of the proper county, that they were present and saw the testator or testatrix sign said will, testament or codicil, in their presence, or acknowledge the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will, testament or codicil, to admit the same of record; provided, that no proof of fraud, compulsion or other improper conduct be exhibited, which, in the opinion of the said county court, shall be deemed sufficient to invalidate or destroy the same, and every will, testament or codicil, when thus proven to the satisfaction of the court, shall, together with the probate thereof, be recorded by the clerk of said court, in a book to be provided by him, for that purpose, and shall be good and available in law for the granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein and thereby devised, granted and bequeathed.”⁸

§ 1776. Indispensable Requisites to Execution of Will—There are some indispensable requisites to the due execution of a will; it must be in writing, signed by the testator, or by some one in his presence and by his direction, and attested by two or more witnesses. A paper which is not thus subscribed and witnessed has no force or effect as a will under the statute.⁹

The provisions of the statute in regard to the execution and attestation of wills is fully considered by the court in the case of *Elston v. Montgomery*, 242 Ill. 348. This is a leading case; the provisions of the statute and the principles announced by the authorities cited in support of the opinion are fully reviewed, and the case is entitled to careful consideration. It appears that the will was executed

8—Sec. 2, Ch. 148, R. S.

9—*Rigg v. Wilton*, 13 Ill. 15.

some years before the death of the testatrix; the attesting clause signed by the witnesses was full and complete, and both the witnesses were dead at the time the will was offered for probate.

It was contended by the contestants of the will (1) that the will was not signed by the testatrix as required by law, and (2) that it was not acknowledged by her in the presence of the subscribing witnesses, as required by law. It was recited in the will: "In testimony whereof I have hereunto set my hand and seal," and the contestants insisted that it was incumbent upon the proponents of the will to prove that the signature of the testatrix was her genuine handwriting; that the law required the will to be signed by the testatrix in her own hand, or by some one for her in her presence and at her direction, and when the witnesses are dead the signature must be proved before the full presumption arises that the will was duly executed. The court considers the provisions of sections 2 and 6 of the Statute of Wills, and the contestants took the position that the "secondary evidence" required by section 6 is the next best evidence obtainable to that of the subscribing witnesses, if they were alive and present, and that means that proof should be made that the signature of the testatrix was in her own handwriting. The court say: "There would be force in this position if it were required, in order to make a valid will, that it be signed by the testator or testatrix in his own hand. The law makes no such requirement. The name of the testator or testatrix may be signed by some one else by his or her direction, and if it is acknowledged in the presence of two witnesses to be his or her act and deed it is as valid as if he or she had signed it with his or her own hand. It would seem by section 2 of the statute above quoted, that where the witnesses are alive proof of the will may be made by the oath or affirmation of the witnesses that they saw the testator sign it, or by the oath or affirmation of said witnesses that he acknowledged it to be his act and deed."

It has been held that the death of a subscribing witness merely changed the form of proof and permits secondary evidence of the attestation and execution of the will. Proof of the handwriting of the deceased witness is *prima facie* sufficient, especially where the signatures of the witnesses are attached to an attesting clause that the will was written, signed and sealed in their presence. Where the testator declares to the witnesses that the instrument is his will and requests them to attest his will, such declaration or request implies that the same has been signed by him.

In the case of *More v. More*, 211 Ill. 268, both witnesses to the will were dead; there was no attestation clause to the will; proof was offered of the genuineness of the signature of the testator to the will and also of the witnesses thereto. The court held that this raised the presumption that the will was duly attested by the witnesses in the presence of the testator. If a perfect and formal attesting clause, reciting that all the statutory requirements had been complied with, signed by the attesting witnesses, the presumption of regularity and compliance with the statutory requirements would arise and warrant the admission of the will to probate. Proof of either the signing or acknowledgment of a will in the presence of witnesses is sufficient and it is not even necessary that the subscribing witnesses know that the instrument is a will. It is not necessary that the attesting witnesses see the signature upon the face of the will, that they know that the instrument they are witnessing to be a will, or that the acknowledgment of the signature be made to them by the testator. The statutory requirement is satisfied if the testator acknowledge the execution of the will. And such acknowledgment need not be in language. Any act, sign or gesture of the testator will suffice which indicates an acknowledgment of the will with unmistakable certainty. It not infrequently happens that witnesses are called upon to attest a will after it has been written and signed by the testator and do not see the signature when they attest the will, nor is any

mention of its having been signed at the time of the attestation. Obviously, in such cases the witnesses could not swear to the signature of the testator, and yet if he acknowledged it to be his act and deed in the presence of witnesses and at his request they attested it, it would be a compliance with the statute. Where witnesses' names are signed to an attesting clause reciting all the requirements of the statute necessary to the valid execution of a will have been complied with, due weight should be given to it, and from it the presumption arises that the statute has been complied with, and in such a case, when the witnesses are dead, proof of their signatures is *prima facie* sufficient to establish the will. And although the clause may recite that the will was signed, sealed, published and declared by the testator as and for his last will and testament in their presence and at his request they have subscribed their names as witnesses thereto, but does not say that it was signed by his own hand or that it was signed in the presence of the witnesses, still it is sufficient, *prima facie*, to establish the due execution of the will without further proof of the handwriting of the testator. Such proof of course is not conclusive, but may be overcome by testimony showing that the will was not in fact executed by the testator. But proof that the signature to the will was not the signature of the testator does not overcome the *prima facie* case. The clause in a will, "I have hereunto set my hand and seal," does not necessarily import that the testator signed with his own hand. It becomes "his hand" if his name is written by some one else at his direction, to the same extent as if he had written it with his own hand.¹⁰

It does not matter who dictated the will, who wrote it or when it was drafted. If there be no doubt as to the tes-

10—*Elston v. Montgomery*, 242 Ill. 348. Citing: *Hobert v. Hobert*, 154 Ill. 610; *More v. More*, 211 Ill. 268. In *re Est. Kohley*, 200 Ill. 189; *Web-*

ster v. Young, 194 Ill. 408; *Harp v. Parr*, 168 Ill. 459; *Gould v. Theological Sem.*, 189 Ill. 282.

tator subsequent to the will being drafted, saw it and signed it, the presumption is, that he adopted it as his will.¹¹

§ 1777. Joint, Mutual and Reciprocal Wills—Two persons may at the same time execute separate wills disposing of their property, and there is no legal objection to uniting their wills in a single instrument if it is such that it may take effect upon the death of one of the parties so far as it relates to the property of that one. The fact that husband and wife devise their property reciprocally to each other by the same instrument or that it is a joint and mutual will, does not deprive it of validity if the will can be given effect on the death of either so far as the property of that one is concerned.¹²

A joint will is one where the same instrument is made the will of two or more persons and is jointly signed by them but it is not necessarily mutual or reciprocal, and if it is not reciprocal it is simply the individual will of each signor, and is subject to the same rules as though the wills were several.

There is no legal objection to the uniting the wills of two or more persons in a single instrument, if such instrument can be given effect on the death of either, as the will of that one.

A joint will contained in a single instrument is the will of each of the makers, and on the death of one it may be probated as his will, and be again probated at the death of the other as the will of the latter.

A joint and mutual will is one executed by two or more persons jointly, the provisions of which are reciprocal, and which shows on its face that the devises are made one in consideration of the other; and such a will, while revocable by one during the lifetime of both, upon notice to the other, becomes irrevocable after the death of one if the

11—Doran v. Mullen, 78 Ill. 342.

552; Peoria Humane Soc. v. Mc-

12—Gerbrich v. Freitag, 213 Ill.

Murtrie, 229 Ill. 519.

survivor takes advantage of the provisions made by the other.

A joint and mutual will cannot be said to have been executed by the parties without some previous understanding or agreement between them, and where it shows on its face that the provisions of one were considerations for the provisions of the other, no evidence other than the will itself and the acts of the parties is necessary to prove a compact which will prevent revocation by the survivor, who takes advantage of the provisions made by the other.

Mutual wills are the separate wills of two persons which are reciprocal in their provisions and where the instruments are separate it is necessary, in order to deprive either party of the right of revocation to show that the wills were executed in pursuance of a compact of the parties and that each is consideration for the other.¹³

A mutual compact by two persons to make testamentary dispositions in each other's favor is apparently enforceable in equity in some cases, as where the survivor accepts the benefit under the disposition of the deceased testator.¹⁴

A joint, mutual or reciprocal will, like any other, is ambulatory during the life of the makers, and it may be revoked by either at any time before his death. The right of revocation cannot be doubted at least as to either maker who has taken no benefit or advantage under the will. The subsequent marriage of one of the makers of a joint will operates as a revocation thereof, and the joint will can no longer be considered as the will of such person.¹⁵

§ 1778. Witnessing Will—What constitutes attestation of a will in the presence of the testator has frequently been explained by our courts, and a general statement of the rule is that the testator must be so situated, both as to the will and the witnesses, that he may, if he chooses, see both

13—*Frazier v. Patterson*, 243 Ill. 80.

14—*Klussman v. Wessling*, 238 Ill. 568.

15—*Peoria Humane Soc. v. Mc Murtrie*, 229 Ill. 519.

in the act of attestation. The plain meaning of the law is that both the will and the witnesses must be in the presence of the testator so that he may without any effort or change in his position see both and see the act of attestation. It is not an attestation in his presence if he cannot see the act, but merely concludes from the surrounding circumstances and what he understands is going on that an attestation is taking place. It is immaterial whether the attestation is in the same room or in an adjoining room, but the essential thing is that the testator must have an opportunity of personal knowledge, by his own vision and in his actual position that the witnesses are signing their names to the instrument which he has signed as his will, in accordance with his request.¹⁶

Where the issue submitted to the jury is whether or not the attestation of the will was in the presence of the testator, the witness should not be permitted to give his judgment as to the determination of the issue. The testimony of the witness should be confined to the facts from which the issue is to be determined and the conclusion to be drawn therefrom should be left to the jury without reference to the opinion of the witness.

It is not enough for the testator to be able to judge from such acts as he may see that the witnesses were signing his will. It is essential to the attestation which the law requires that the testator have the opportunity of seeing the very act of attestation, the will, the witnesses and the act. It is not enough that the testator to be able to see the witnesses and enough of the act then being done by them to know that they were signing their names to the will.¹⁷

The authorities have always given to the word "Presence" the meaning of conscious presence, so that the act of attestation may be within the actual presence and personal knowledge of the testator. The test of presence of the testator is contiguity with an uninterrupted view be-

16—*Quirk v. Pierson*, 287 Ill. 176.

17—*Snyder v. Steele*, 287 Ill. 159.

tween the testator and the subscribing witnesses. It is not necessary that the act of attestation be performed in the same room with the testator, if it takes place within the testator's range of vision where he can see the signing, considering his position and the state of his health at the time. It is still in his presence although he may turn away and choose not to look at the act. On the other hand, no mere contiguity of the witnesses will constitute presence if the position of the testator is such that he cannot possibly see the witnesses sign. An attestation is not in the presence of the testator, though the witnesses are in the same room and close to him if some material obstacle prevents him from knowing of his own knowledge or perceiving by his senses the act of attestation.¹⁸

It is not necessary that the attesting witnesses see the signature of the testator upon the face of the will, that they know that the instrument they are witnessing to be a will, or that an acknowledgment of the signature be made to them by the testator. The statutory requirement is satisfied if the testator acknowledges the execution of the will. And such acknowledgment need not be in language. Any act, sign or gesture of the testator will suffice which indicates an acknowledgment of the will with unmistakable certainty. Our statute requires the testator to acknowledge the will to be his act and deed, although in some States the statute requires the testator to acknowledge the signature to the will to be his. Where the testator requests the witness to attest his will, that is sufficient to authorize the inference that he executed the paper as a will, and is equivalent to an acknowledgment that he had signed the paper as a will.¹⁹

From the fact that the will is in the handwriting of the testator and his genuine signature is attached thereto, and

18—*Dubach v. Jolly*, 279 Ill. 530.

19—*Gould v. Chicago Theo. Seminary*, 189 Ill. 282.

that he sought out the witnesses and asked them to witness it, the presumption arises that the will was signed at the time it was witnessed, although the witnesses did not see his signature or know the nature of the instrument.²⁰

Where the request for the witnesses to a will is made by a third person in the presence of the testator and at his desire it is the same as if the testator had personally requested the witnesses to act as such. It is not necessary that the testator by his own words acknowledges his signature, or requests the attestation of the witnesses, and if the persons are brought before him by a third party with a statement in his presence that they are brought for the purpose of witnessing his will, and he then executes the will, which is signed by them in his presence, his assent may be inferred, unless there is other evidence leading to a different conclusion.²¹

No rule of law makes the probate of a will depend upon the recollection, or even the veracity, of the subscribing witness. The forgetfulness or falsehood of a subscribing witness cannot invalidate a will. Such evidence is not conclusive either way, nor does the law presume that they are more or less truthful than others. It presumes they had, when they signed, full knowledge of what they were doing, and in case they are dead their attestation, when proved, is *prima facie* evidence that all was done as it should be.²²

The rule is, that where the attesting clause to a will recites all the particulars of a good execution as required by the statute, such clause will be *prima facie* evidence of the due execution of the will. Such proof will often prevail over the testimony of attesting witnesses which tends to show that some of the requisites were wanting.²³

The law for wise and obvious reasons requires that a

20—Gould v. Chicago Theo. Seminary, 189 Ill. 282; Hobart v. Hobart, 154 Ill. 610.

21—Dubach v. Jolly, 279 Ill. 530.

22—Gould v. Chicago Theo. Seminary, 189 Ill. 282.

23—Hart v. Hart, 290 Ill. 476.

tion of the will, yet a codicil does not operate to alter the original will except where so designated the true rule is that where a codicil makes no reference to a clause of the will creating a devise which has lapsed the republication of the will by the execution of such a codicil does not alter such clause of the will, nor create a new and different devise from that which has lapsed. The fact that a will is republished by the execution of a codicil by the testator and as republished contains a lapsed devise is not, of itself, sufficient to vest the title to the property described in the lapsed devise in the heir of the deceased devisee, where such devisee was given a fee.⁵

The generic term "will" includes codicils and legal provisions relating to wills must be understood as embracing codicils. A codicil duly attested is a will. Proof of a codicil, whether written on the same paper or on a separate paper, which codicil clearly and unmistakably refers to the will so as to preclude all doubt of its identity, establishes the will without further proof. Such is the rule in this State. It is held that the publication of a codicil is a republication of the will in the form it was at the time of the execution of the codicil and proof of the execution of the codicil establishes the will.⁶

§ 1774. Proper Execution of Will a Question of Law—Whether a will has been executed with all the proper formalities required by the statute is a question of law and not of fact to be considered by the jury.⁷

§ 1775. Manner of Making and Executing Wills—Probate—Statute—"All wills, testaments and codicils, by which any lands, tenements, hereditaments, annuities, rents or goods and chattels are devised, shall be in writing, and signed by the testator or testatrix, or by some one in his or her presence, and by his or her direction, and attested in

5—Dunn v. Kearney, 288 Ill. 49.

7—Johnson v. Johnson, 187 Ill. 86.

6—Newhall v. Newhall, 280 Ill.

199.

the presence of the testator or testatrix, by two or more credible witnesses, two of whom, declaring on oath or affirmation, before the county court of the proper county, that they were present and saw the testator or testatrix sign said will, testament or codicil, in their presence, or acknowledge the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will, testament or codicil, to admit the same of record; provided, that no proof of fraud, compulsion or other improper conduct be exhibited, which, in the opinion of the said county court, shall be deemed sufficient to invalidate or destroy the same, and every will, testament or codicil, when thus proven to the satisfaction of the court, shall, together with the probate thereof, be recorded by the clerk of said court, in a book to be provided by him, for that purpose, and shall be good and available in law for the granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein and thereby devised, granted and bequeathed.”⁸

§ 1776. Indispensable Requisites to Execution of Will—There are some indispensable requisites to the due execution of a will; it must be in writing, signed by the testator, or by some one in his presence and by his direction, and attested by two or more witnesses. A paper which is not thus subscribed and witnessed has no force or effect as a will under the statute.⁹

The provisions of the statute in regard to the execution and attestation of wills is fully considered by the court in the case of *Elston v. Montgomery*, 242 Ill. 348. This is a leading case; the provisions of the statute and the principles announced by the authorities cited in support of the opinion are fully reviewed, and the case is entitled to careful consideration. It appears that the will was executed

⁸—Sec. 2, Ch. 148, R. S.

⁹—*Rigg v. Wilton*, 13 Ill. 15.

some years before the death of the testatrix; the attesting clause signed by the witnesses was full and complete, and both the witnesses were dead at the time the will was offered for probate.

It was contended by the contestants of the will (1) that the will was not signed by the testatrix as required by law, and (2) that it was not acknowledged by her in the presence of the subscribing witnesses, as required by law. It was recited in the will: "In testimony whereof I have hereunto set my hand and seal," and the contestants insisted that it was incumbent upon the proponents of the will to prove that the signature of the testatrix was her genuine handwriting; that the law required the will to be signed by the testatrix in her own hand, or by some one for her in her presence and at her direction, and when the witnesses are dead the signature must be proved before the full presumption arises that the will was duly executed. The court considers the provisions of sections 2 and 6 of the Statute of Wills, and the contestants took the position that the "secondary evidence" required by section 6 is the next best evidence obtainable to that of the subscribing witnesses, if they were alive and present, and that means that proof should be made that the signature of the testatrix was in her own handwriting. The court say: "There would be force in this position if it were required, in order to make a valid will, that it be signed by the testator or testatrix in his own hand. The law makes no such requirement. The name of the testator or testatrix may be signed by some one else by his or her direction, and if it is acknowledged in the presence of two witnesses to be his or her act and deed it is as valid as if he or she had signed it with his or her own hand. It would seem by section 2 of the statute above quoted, that where the witnesses are alive proof of the will may be made by the oath or affirmation of the witnesses that they saw the testator sign it, or by the oath or affirmation of said witnesses that he acknowledged it to be his act and deed."

It has been held that the death of a subscribing witness merely changed the form of proof and permits secondary evidence of the attestation and execution of the will. Proof of the handwriting of the deceased witness is *prima facie* sufficient, especially where the signatures of the witnesses are attached to an attesting clause that the will was written, signed and sealed in their presence. Where the testator declares to the witnesses that the instrument is his will and requests them to attest his will, such declaration or request implies that the same has been signed by him.

In the case of *More v. More*, 211 Ill. 268, both witnesses to the will were dead; there was no attestation clause to the will; proof was offered of the genuineness of the signature of the testator to the will and also of the witnesses thereto. The court held that this raised the presumption that the will was duly attested by the witnesses in the presence of the testator. If a perfect and formal attesting clause, reciting that all the statutory requirements had been complied with, signed by the attesting witnesses, the presumption of regularity and compliance with the statutory requirements would arise and warrant the admission of the will to probate. Proof of either the signing or acknowledgment of a will in the presence of witnesses is sufficient and it is not even necessary that the subscribing witnesses know that the instrument is a will. It is not necessary that the attesting witnesses see the signature upon the face of the will, that they know that the instrument they are witnessing to be a will, or that the acknowledgment of the signature be made to them by the testator. The statutory requirement is satisfied if the testator acknowledge the execution of the will. And such acknowledgment need not be in language. Any act, sign or gesture of the testator will suffice which indicates an acknowledgment of the will with unmistakable certainty. It not infrequently happens that witnesses are called upon to attest a will after it has been written and signed by the testator and do not see the signature when they attest the will, nor is any

cated within the technical meaning of "heirs at law," the word "heirs" as used in the document, under our statute, carries a fee.⁴⁰

Where a will is so written that the intention to be gathered from it is that the testator intended his lands to go on the principles of per stipes, and not per capita, then the interest each devisee takes is fixed by the statute as in case of intestacy, especially where there is nothing in the will to indicate that the devise to the "heirs" of the testator was to be other than such an heir would take under the statute.⁴¹

§ 1787. Devises Imposing Personal Liability on Devisee

—Where devisees or legacies are by the will made a personal charge upon the devisee, the acceptance of the devisee imposes a personal liability on the devisee; who takes the estate devised, as a purchaser and in fee, unless a less estate is limited; but if the legacy is charged upon the devised estate, the devisee does not take as a purchaser, but as a beneficial devisee.⁴²

§ 1788. Legacies Sometimes Chargeable Upon the Realty

—The general rule is that where, in a residuary clause real and personal estate is commingled, the intention of the testator thereby expressed is, that the residuary legatee shall take only that which is left after all other legacies have been satisfied, and that consequently, upon a failure of personal assets to satisfy the personal bequests, it will be presumed the intention of the deviser was that they should be charged upon the realty given under such residuary clause.⁴³

§ 1789. Devise of Fee Not Cut Down to a Lesser Estate

—Where a testator by his will devises a fee, the fee will not be cut down to a lesser estate by a subsequent provision of the will, unless such subsequent provision is clear

40—Carpenter v. Van Olinder, 127 Ill. 42.

41—Kirkpatrick v. Kirkpatrick, 197 Ill. 144.

42—Morrison v. Schorr, 197 Ill. 554.

43—Dearlove v. Otis, 99 Ill. App. 99.

and unambiguous, and the courts will so construe the will, if possible, as to give an estate of inheritance to the first donee.⁴⁴

The rule is, that a simple devise of land without any two words of inheritance is sufficient, under section 13 of the Conveyance Act, to convey an absolute estate in fee, unless a contrary intent is shown in the other parts of the will. It is the disposition of courts to adopt such a construction as will give an estate of inheritance to the first devisee. Therefore, when a fee is devised by one clause of the will and the other portions or clauses are relied upon as limiting or qualifying the estate thus given, they should be such as show a clear intention on the part of the testator to thus qualify the estate granted. Where a testator by his will employs language sufficient to pass the fee simple title to land, in the absence of a clear intention to cut down the fee to a life estate an estate in fee simple will pass. If, however, it is clearly shown by other clauses or parts of the will that the testator intended to limit the fee thus granted such intention will prevail, and it is wholly immaterial in what part of the will such intention is manifested.⁴⁵

§ 1790. Conversion of Realty into Personalty—Lands Devised to a Trustee with Directions to Sell and Divide the Proceeds—Where a devise is made of lands to a trustee with directions to sell the same and distribute the proceeds thereof to certain persons named in the will in certain amounts as specified therein the question of whether any of such persons should receive any amount, and if so, how much, depends upon the sale of the real estate by the trustee and the amount received on such sale. Their rights

44—*Nixon v. Nixon*, 268 Ill. 524. *John*, 201 Ill. 292; *Rose v. Hale*, 185

45—*Meins v. Meins*, 288 Ill. 463. Ill. 378; *Huffman v. Young*, 170 Ill. 290; *Whitcome v. Rodman*, 156 Ill. 116.
Citing: *Giles v. Anslow*, 128 Ill. 187;
Jones v. Jones, 124 Ill. 254; *Walker v. Pritchard*, 121 Ill. 221; *Bowen v.*

depend entirely on the devise of the real estate to the trustee.⁴⁶

Lands devised to be sold by the executor and the proceeds to be distributed, is a devise of the proceeds and not of the land. This conclusion is not at all affected by the fact that the legal estate is not devised to the executor. It can make no difference whether it be held to be devised by implication to the executor, as necessary to enable him to execute the trust, or it is left by the will to descend to the heir at law. The general principle applicable to trusts of this character is, that the trustee will take exactly that quantity of interest which the purposes of the trust require. If the fee is required, the fee will be taken; if a less estate only is required, a less estate only will be vested. The legal title to the land is held in trust for the purposes specified in the will, whether the title is left to descend to the heir by operation of law, or by the will it is vested in the executor; nor does it make any difference in this respect, that the legal title descends to the devisee to whom the bequest is to be paid in money when the land is sold. In either event the title will be divested upon the execution of the power of sale.⁴⁷

Where a will directs the executor to sell real estate and divide the proceeds, equity will apply the doctrine of equitable conversion, and regard the devise as one of personal property and not of real estate. That doctrine is founded upon the principle that equity regards that as done which ought to have been done, and the nature of the property is considered as changed for the purposes of the will. The testator having directed that his real estate be changed into personal property for the purposes of the will, equity regards it as already done, if such purposes require it. But equity never requires the conversion of real estate into personal property unless such a change is necessary to accomplish the lawful purposes of the will. If circumstances

46—Meily v. Knox, 269 Ill. 463.

47—Ebey v. Adams, 135 Ill. 80.

arise which render the conversion unnecessary, or if the purpose of a change fail, the law will not require the conversion to be made. In such case the conversion is not required and ought not to be made, and therefore, the foundation of the rule does not exist.

Where the testator directs that his lands be sold and the proceeds thereof be applied in the payment of specific legacies, unless the testator manifests a contrary intention, the law presumes that he intended to deprive the heir of the land for a particular purpose, and if the purpose fails in part, the portion as to which it fails will go to the heirs.⁴⁸

The provisions of a will making it the duty of the executor to sell the lands of the deceased, and pay the proceeds thereof over to certain devisees or legatees, who are aliens, equity will regard the conversion as having taken place at the time of the death of the testator, the status of the beneficiaries being that of legatees of personal property and not that of devisees of real estate.

The object and purpose of the act which disqualifies aliens from acquiring title to real estate in this state is not to prohibit them from becoming beneficiaries under a will but merely to prevent them from acquiring title to real estate.⁴⁹

The doctrine of equitable conversion is well recognized by the courts. Where a testator in his will makes a positive direction to sell his real estate and to divide the proceeds thereof among the legatees therein named, such direction amounts to a conversion of the real estate into personal property, and the legatees take the same as personal property. Where the power granted to an executor to convert land into money is full and complete and not referred to his discretion, the absence of an express command or direction will not render the exercise of such power dis-

48—Dorsey v. Dodson, 203 Ill. 32.

49—Greenwood v. Greenwood, 178 Ill. 387.

cretionary, when to so hold would defeat the intention of the testator as manifested from the whole will. When the direction to convert is apparent from the whole will, whether expressed or implied, the duty and obligation to convert is imperative. When the general scheme of the will requires a conversion, the power of sale, although not in terms, and imperative, operates as a conversion; and this will be deemed immediate, although the donee of the power is vested, for the benefit of the estate, with a discretion as to the time and manner of sale. It has been held that conversion will take place though the language confers a mere discretionary power of sale, where it is not possible to execute certain provisions of the will without a sale of the real estate and personal property.⁵⁰

§ 1791. **Re-conversion of Property**—The general rule is, that there may be a re-conversion of the bequest in cases of equitable conversion where all the legatees are *sui juris* and agree and elect to take the land instead of the proceeds of the sale. The doctrine of equitable conversion is based upon the principle that equity regards things directed or agreed to be done as having been done where nothing has intervened which ought to prevent a performance. Re-conversion is that imaginary process by which a prior constructive conversion is annulled and the converted property restored, in contemplation of law, to its original state. It is well settled by authority that where there is a devise of the proceeds of the sale of land to a number of persons and the amount each is entitled to receive cannot be determined till the land is sold there cannot be a re-conversion, except upon the concurrent action of all the devisees. In such case it cannot be determined what the interest of the respective devisees in the land is worth except by a sale of the land, and therefore no payment could be made to one devisee of his interest by the other devisees.⁵¹

50—Grove v. Willard, 280 Ill. 247.

51—Hoopeston Public Library v. Eaton, 283 Ill. 449.

§ 1792. Time When Devises Take Effect—The English rule now accepted is, when the death of the first taker is coupled with circumstances which may or may not take place, as, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator.⁵²

Where a will contemplates the distribution subsequent to the death of the testator the time must be fixed by the will itself. It cannot be left open, to be determined by the executor or trustee.⁵³

The probate of a will or letters testamentary, when granted, relate back to the date of the testator's death. The probate of the will merely furnishes the establishing by record evidence the validity of an existing right.⁵⁴

§ 1793. Devises to a Class—Time of Taking Effect—Where there is a simple devise to a class, and the will neither expressly nor by implication, fixes the time when the devisees are to be ascertained, or when the division is to be made, the law will fix it at the time of the death of the testator, that being the time when the will first speaks.⁵⁵

The general rule is that where devisee compose a class and there are no words of devise except simple direction to divide the property at a specified time, the gift will not vest until the time of division.

§ 1794. Distinction as to Time of Vesting of Devises and Legacies—A gift to a person if or when he shall attain a certain age will not vest till he attains that age. There is a distinction between a gift of a legacy to a person to be paid to him at a certain time, and a direction to pay or

52—Summers v. Smith, 127 Ill. 645.

55—Lancaster v. Lancaster, 187

53—Wimbush v. Wimbush, 253 Ill. Ill. 540.

407.

54—Armstrong v. Barber, 239 Ill.

389.

transfer the legacy to him at a certain time in the future. In the former case the legacy is considered as vesting in him immediately, but where the gift is merely a direction to pay to him at a future time the legacy does not vest forthwith.

It is a general rule in regard to vesting of personal legacies, that if there is no independent bequest, but only a direction to pay at a future time or upon the happening of a certain event, the vesting will be postponed until the event has happened or the time arrived. But the general rule is subject to an exception so well established and so universally recognized as to practically constitute another general rule, which is: though a gift arises wholly out of directions to pay or distribute in future, yet if such payment or distribution is not deferred for reasons personal to the legatee, but merely because the testator desired to appropriate the subject matter of the legacy to the use and benefit of another for and during the life of such other, the vesting of the gift in remainder will not be postponed, but will vest at once, the right of enjoyment, only, being deferred. The principles which apply to and control vesting of bequests of personal property are in general equally applicable to devises of real estate.⁵⁶

§ 1795. Distinction Drawn Regarding Time of Death of Devisee—There is a well recognized distinction between a devise *simpliciter* to one person and in case he should die to another, and a devise over coupled with a contingency, such as to die under age or unmarried, which may or may not happen.

In the former case it is held that the time of death referred to is before the death of the testator, and under such a clause, if the primary devisee survives the testator he will take an estate in fee and the devise over will never take effect.

⁵⁶—Eldred v. Meek, 183 Ill. 26;
Dee v. Dee, 212 Ill. 338.

But this rule has no application to a devise over which is connected with a contingency which may or may not happen. In such case the time of death referred to is death at any time under the conditions named, either before or after the death of the testator.

Where under a clause in a will it is clear it was intended by the testator that his children should have a life estate only, and the devise over of a remainder in fee is to such of their children as may be living at the time of the death of their parents, and in case either of the children of the testator died without leaving any children surviving them, then the survivor of the children of the testator should take the entire life estate. The remainder therein provided for to the grandchildren is contingent upon their surviving their parents.⁵⁷

§ 1796. Disposing of Property Acquired after Execution of Will—The question whether a will passes the real estate acquired after its execution depends upon the intention of the testator. Unless an intention to dispose of such estate affirmatively appears from the will, it will not pass. Where, however, a testator devises “All the real estate that I may die seized of” this language shows an intention to dispose of any property he might acquire after the execution of his will, and these words are not to be regarded as descriptive of the lands he then owned as intending to limit the prior devise of all his real estate.⁵⁸

§ 1797. Ratification of Will by Acceptance of Devise—It is a well settled rule in equity, that if any person shall take a beneficial interest in a will, he shall thereby be held to confirm and ratify every part of the will—or, in other words, a man shall not take a beneficial interest under a will, and at the same time set up a right or claim of his own, even if otherwise legal and well founded, which shall de-

57—*Kleinhans v. Kleinhans*, 253 Ill. 620. 557; *Woman's U. M. S. of A. v. Mead*, 131 Ill. 338.

58—*Cummings v. Lohr*, 246 Ill.

feat or in any way prevent the full effect and operation of every part of the will. So, where certain property was devised by the testator to a certain devisee, and this fact became known to the complainant, who was also a devisee under the will, and who claimed an equitable interest in the certain property devised, the complainant was bound to elect to rely on her title to the property, or whether she would abandon that title and take the devise for her benefit under the will.⁵⁹

§ 1798. Rights of Posthumous Child—Statute—“When an estate hath been or shall be, by any conveyance limited in remainder to the son or daughter, or to the use of the son or daughter of any person to be begotten, such son or daughter, born after the demise of his or her father, shall take the estate in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after death.”⁶⁰

§ 1799. Vesting or Contingent Devises—Where there are no words importing a gift, other than to the executors or trustees to divide or pay at a future time, the legacy is contingent; still, if the payment is postponed for the convenience of the funds of the estate and not for reasons personal to the legatee or devisee it should be held vested.⁶¹

§ 1800. Lapsing of Devises or Legacies—At common law a devise or legacy always lapses where the devisee or legatee dies before the death of the testator. To prevent the lapsing of a devise to a child or grandchild of the testator, section II of our Statute of Descent was enacted. But the statute for the prevention of lapses is not intended to defeat the will but to supplement, and will not control if it be inconsistent with the will.⁶²

The general rule is, that if a legacy or devise lapses and

59—*Graham v. Dodge*, 122 Ill. 528;
Wilbanks v. Wilbanks, 18 Ill. 17.
60—Sec. 14, Ch. 30, R. S.

61—*Walker v. Walker*, 283 Ill. 11.
62—*Walker v. Walker*, 283 Ill. 11.

there is a general residuary clause broad enough in its terms to embrace it, such legacy or devise will sink into the residuum. This is based upon the presumed intention of the testator that the residuary clause shall embrace everything not effectually devised or disposed of. The rule is further aided by the presumption of law that where a man dies testate he intended by his will to dispose of all his property and leave no part of his property intestate.⁶³

§ 1801. Devise Creating a Perpetuity Void—The rule against perpetuities is, that no interest subject to a condition precedent is valid unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest. It is not enough that the contingent event upon which the estate is limited may happen, or even that it will probably happen, within the limits of the rule, but if it can possibly happen beyond those limits the interest is too remote and its creation prohibited by the rule.⁶⁴

A bequest to an unincorporated cemetery association of a certain amount to be held in trust and placed at interest perpetually and the interest to be used each year for the care of a burial lot is in violation of the rule against perpetuities and therefore void.⁶⁵

The creation of a trust for the perpetual care of a burial lot is void on the ground it violates the rule against perpetuities.⁶⁶

§ 1802. Residuary Clause in Will—It is usual to include in a will a clause by which all the estate of the testator not specially devised or bequeathed is devised or bequeathed to a single person for his use or for a special purpose. This clause is known as the residuary clause.

63—Dunn v. Kearney, 288 Ill. 49.

65—McCartney v. Jacobs, 288 Ill.

64—Drury v. Drury, 271 Ill. 336.

568.

Citing: Howe v. Hodge, 152 Ill. 252;

66—Burke v. Burke, 259 Ill. 262.

Nevitt v. Woodburn, 190 Ill. 283;

Lawrence v. Smith, 163 Ill. 149.

The term "residue" means that which is remaining, and no particular expression is necessary to constitute a residuary clause. It is a general rule to so construe a residuary clause so as to prevent the intestacy of any part of the testator's estate, unless there is an apparent intention to the contrary.⁶⁷

§ 1803. **Date of Will**—Where it appears that the petition for the probate of a will, that the deceased died on a certain date and the will bears date subsequent thereto this is not evidence tending to prove that the will was subsequently fabricated for fraudulent purposes. The more reasonable presumption is that the petitioner was mistaken as to the date of the deceased, or that a mistake was made as to the date of the will. It would be an unreasonable presumption to say that, because of this discrepancy in dates, the will must be a forgery.⁶⁸

§ 1804. **Devise Revoked by Sale by Testator**—Where real estate is devised, a sale of the real estate by the testator in his lifetime revokes the devise, there is no basis left for the beneficiaries to claim any interest in the estate.⁶⁹

§ 1805. **Gifts and Devises to Beneficial Witness Void—Statute**—"If any beneficial devises, legacies or interest shall be made or given by any will, testament or codicil to any person subscribing such will, testament or codicil, as a witness to the execution thereof, or to the wife or husband of such person, such devise, legacy or interest shall, as to such beneficiary thereof, and all persons claiming under him, be null and void, unless such will, testament or codicil be otherwise duly attested by a sufficient number of witnesses, exclusive of such person, according to this act; and he or she shall be compelled to appear and give testimony on the residue of such will, testament or codicil, in like

67—Dunn v. Kearney, 288 Ill. 49.

69—Meily v. Knox, 269 Ill. 463.

68—Doran v. Mullen, 78 Ill. 342;
Thompson v. Karme, 268 Ill. 168.

manner, as if no such devise or bequest had been made. But if such witness or beneficiary would have been entitled to any share of the testator's estate in case the will, testament or codicil was not established, then so much of such share shall be saved to such witness or beneficiary as shall not exceed the value of said devise or bequest made to him or her as aforesaid.

This act being remedial in character shall be construed liberally, and shall apply to cases arising on wills of persons deceased, prior to the adoption of this act, but not fully adjudicated.⁷⁰

The test of the competency of a witness to a will is, whether the witness will gain or lose financially as a direct result of the establishment of the instrument as a will. Under this rule, a person who is appointed executor by a will is incompetent as a witness because he will gain the commissions allowed by law if the will is established, and that is a direct financial gain to him, and another person who by virtue of a contract is to share in the fees earned by the executor is equally incompetent. The interest must be a legal interest in the outcome of the suit and it must be certain, direct and immediate. The question whether a stockholder of a corporation is a competent witness to testify against the representatives of a deceased person where the corporation will gain or lose as the result of a suit must be regarded as settled. Stockholders of a corporation are the owners of the income and earnings of the corporation and directly interested therein, and, as a general rule, unaffected by any special statutory provision, they are incompetent to testify for the benefit of the corporation against an heir-at-law, devisees or legatees.

There is, however, a special statutory provision applicable to a witness attesting the execution of a will. In the revision of the statutes of 1872, a provision of the Revised

⁷⁰—Laws 1911, p. 538; Sec. 8, Ch. 148, R. S. 1919.

Statutes of 1845 was brought forward as section 8 of the Statute of Wills. It removed the incompetency of a witness to the execution of a will to whom any beneficial devise, legacy or interest was made or given by a will and provided that such witness should be compellable to appear and give testimony on the residue of the will in like manner as if no such devise or bequest had been made, but the devise, legacy or interest was declared null and void, unless the will had been duly attested by a sufficient number of witnesses exclusive of such person, saving, however, to the witness any share of the testator's estate not exceeding the value of the devise or bequest to which the witness would have been entitled if the will was not established. That section of the Statute of Wills is regarded as remedial. Concerning the application of that section to particular witnesses it is said: "If the incompetent exists outside the fact that the will gave them a beneficial interest in the testator's estate, section 8 of the Wills Act does not remove the incompetency of the witnesses to the will. If, however, the incompetency arises by the act of attesting a will which gives the witness some interest in the testator's estate the statute does apply, and under that section of the statute, while the witness cannot take under the will, nevertheless he may be called and the will established by his evidence."⁷¹

It has been held that an interest that will disqualify a witness to a will must be certain, direct and immediate, showing that he will gain or lose as a direct result of the suit; and if the testimony does not show such direct, certain and immediate interest, his interest, if any, goes merely to his credibility and not to his incompetency.

The court has held that while it is not unlawful it is not good practice or good professional ethics for an attorney connected with a case to appear as a witness in the same

71—*Scott v. O'Connor-Couch*, 271 Ill. 395.

case that the court is not disposed to give any great weight to the testimony of such a witness who assumes the double burden of acting as solicitor in a case and furnishing the evidence necessary to its success. One reason why a solicitor should not testify in a case in which he acts as solicitor is because he may be prejudiced in his interest in presenting the case to the court or jury largely because of the pay that he hopes to obtain by winning the case.⁷²

A beneficial interest, when considered as a designation of the character of an estate, is such an interest as a devisee takes solely for his own use or benefit and not a mere holder of the title for the use of another.⁷³

§ 1806. Witnesses to Appear for Probate of Will—Statute—“It shall be the duty of each and every witness to any will, testament or codicil, made and executed in this state, as aforesaid, to be and appear before the county court on the regular day for the probate of such will, testament or codicil, to testify of and concerning the execution and validity of the same; and the said court shall have power and authority to attach and punish, by fine and imprisonment, or either, any witness who shall, without any reasonable excuse, fail to appear when duly summoned for the purpose aforesaid: PROVIDED, the said punishment by imprisonment shall in no case exceed the space of twenty days; nor shall a greater fine be assessed, for such default than the sum of \$50.”⁷⁴

§ 1807. Non-Resident Witness—Dedimus Potestatum—Statute—“When any will, testament or codicil shall be produced to the county or probate courts for probate of the same, and any witness attesting such will, testament or codicil shall reside without the limits of this state, or the county in which will, testament or codicil is produced for probate, or shall be unable to attend said court, it shall be lawful for such county or probate court, upon the ap-

72—Flynn v. Flynn, 283 Ill. 206.

74—Sec. 3, Ch. 148, R. S.

73—People v. Schaffer, 266 Ill. 334.

plication of any person asking for probate thereof, and upon such notice to persons interested as such county or probate court may, by special order, direct to issue a *dedimus potestatum*, or commission, under the seal of the court annexed to such will, testament or codicil, together with such interrogatories in chief and cross interrogatories as may be filed in said court, or as said court may direct to be propounded to such witness or witnesses, touching the execution of such will, testament or codicil, which commission shall be directed to any judge, master in chancery, notary public, justice of the peace, mayor or other chief magistrate of a city, United States consul or vice-consul, consular agent or secretary of legation, authorizing and requiring him to cause such witness or witnesses to come before him at such time and place as he may designate and appoint, and faithfully take his, her or their depositions on oath or affirmation, upon all such interrogatories as may be enclosed with, or attached to, such commission, and none other, and certify the same when thus taken together with such commission and interrogatories, into the court out of which the commission issued, with the least possible delay. When so taken and returned into the court such deposition or depositions shall have the same operation, force and effect and such will, testament or codicil shall be admitted to probate in like manner, as if such oath or affirmation had been made in court from whence the commission issued. Whenever a commission shall issue to any officer above mentioned not by name but simply by his official title, the seal of his office, attached to his certificate, shall be sufficient evidence of his identity and official character.”⁷⁵

§ 1808. County Judge as Witness—Statute—“In all cases where a county judge, or such other person as may be authorized by law to grant probate of wills and testaments, may and shall have become a witness to any will

⁷⁵—Laws 1881, p. 158; Sec. 4, Ch. 148, R. S. 1916.

or testament which is required by law to be proved before him as such judge or person authorized to grant probate, as aforesaid, and the testimony of such witness is necessary to the proof of the same, then, and in such case, it shall be his duty to go before the circuit court of the county of which such will is to be admitted to record, and make proof of the execution of the same in the same manner that probate of wills is required to be made in other cases. And it shall be the duty of the clerk of the circuit court aforesaid, forthwith to certify such will proved as aforesaid to the county court of the county; and said will shall, thereupon, have the same force and effect that it would have had if it had been proved by one credible witness before the county court; and if there are other witnesses to said will the county court shall take their evidence in support of said will, as in other cases.”⁷⁶

§ 1809. Probate of Will Without Delay—Statute—“When any will, testament or codicil shall be exhibited in the county court for probate thereof as aforesaid, it shall be the duty of the court to receive the probate of the same without delay, and to grant letters testamentary thereon to the person or persons entitled and to do all other needful acts to enable the parties concerned to make settlement of the estate at an early day as shall be consistent with the rights of the respective persons interested therein.”⁷⁷

§ 1810. Petition for Probate of Will to Be Filed—Notice to Be Given—Statute—“That before any will shall be admitted to probate the person desiring to have the same probated shall file a petition in the Probate Court of the proper county asking that said will be admitted to probate, which petition shall state the time and place of the death of the testator and the place of his residence at the time of his death, also the names of all the heirs-at-law, legatees and devisees with the place of residence of each, when known,

76—Sec. 5, Ch. 148, R. S.

77—Laws 1919, p. 991.

and when unknown the petition shall so state, and the said petition shall be verified by the affidavit of the petitioner. And thereupon the clerk of the County Court shall send by mail to each of said parties a copy of said petition, within five days after the filing thereof and not less than twenty days prior to the hearing on said petition. And in case the post office address of any of said parties is not shown by said petition then publication shall be made for at least three successive weeks before the day set for the hearing in a newspaper of general circulation published in the county where said will is offered for probate, which publication shall contain the names of the testator, the heirs-at-law, legatees and devisees, when known, the time and place where said will is to be offered for probate; PROVIDED, that in case such a petition is not filed, and a will has been deposited in said County Court for the space of 10 days, that it shall be the duty of the County Court to proceed to probate said will without petition being filed, but only after having caused publication and notice of the intention to probate said will to be given to the parties in interest as to the court may seem proper; AND PROVIDED, FURTHER, that if, on the presentation of such petition, all the heirs and legatees of such testator shall personally appear in court or, in case they are of legal age and under no disability, shall file in writing their appearance and waiver of notice, then, such will may be admitted to probate without notice. If any heir, devisee or legatee shall be a minor the petition shall set forth the fact of such minority and a *guardian ad litem* shall be appointed by the court for such minor. In the event there are unknown heirs, devisees and legatees and it shall appear after the probate of the will that any of said unknown heirs, devisees and legatees was a minor at the time such will was admitted to probate, then the fact that no *guardian ad litem* for such minor was appointed, shall not invalidate the probate of such will." 78

§ 1811. Probate of Wills on Defective Notice Legalized—Statute—“All probate of wills declared before the taking effect of this Act, in which service has been had upon the parties by one publication at least three weeks before the day set for hearing in a newspaper of general circulation, published in the county where the will was offered for probate, are legalized and declared valid to the same extent and purpose as if publication had been for three successive weeks.”⁷⁹

Under the constitution and the statute the original jurisdiction to establish the validity of wills and admit them to probate is in the county court (or probate court) and not in the circuit court as a court of law. It is true the probate only establishes the original validity of a will, and the title of the devisee relates back to the testator's death, and takes effect from that time; such validity must be established by proof that the will was executed with all the formalities required by law to render it effective as a will.⁸⁰

The county court has original jurisdiction to determine whether an instrument presented for probate is the will of the testator or not, and if that question can be first adjudicated by a court of equity, the county court, instead of exercising the jurisdiction conferred upon it by the constitution and statute, can only register the conclusion of the court of equity. The jurisdiction of the county court includes the probate of lost or destroyed wills upon proof of the facts required by the statute, with additional proof of the loss or destruction of the will and its contents.⁸¹

Prior to the act of 1897 in relation to the probate of wills, in proceedings in the probate court was in the nature of a proceeding *in rem*, but on appeal it became in the nature of a proceeding *inter parties*. Since that act, which requires a petition stating the names of all heirs at law and the legatees, with the place of residence of each, when

79—Sec. 1a, Laws 1919, p. 995.

81—Beatty v. Clegg, 214 Ill. 34.

80—Hicks v. Deemer, 187 Ill. 164.

known, that notice may be given as therein provided, the proceeding in all its stages, is in the nature of a proceeding *inter parties*.⁸²

§ 1812. Production of Witnesses Cannot Be Waived—

Parties to a proceeding for the probate of a will cannot waive the requirement of the statute as to the production of the witnesses to the will.⁸³

§ 1813. Presumptions Indulged in Favor of the Due Execution and Attestation of Will—The law as to what constitutes sufficient proof of the due execution of a will is well settled in this State. It is not necessary that the attesting witnesses remember every circumstance concerning the execution of the will or every word or act of the testator. Where a will has apparently been executed in due form and the signature of the testator and attesting witnesses are admitted to be genuine, no presumption will be indulged to destroy the validity of the instrument, but every reasonable presumption will be indulged in favor of its due execution and attestation. So where the instrument is in due form and contains an attesting clause, which recites that the instrument was subscribed, sealed, published and declared by the testator for his will in the presence of the witnesses, and that they at his request and in his presence and in the presence of each other, subscribed their names and residences as witnesses, and there is nothing in the record which expressly contradicts any of the statement contained in the attesting clause, a *prima facie* case is made in favor of the due execution of the will, and this *prima facie* case is not overcome by the mere fact that the subscribing witnesses testify that they failed to notice whether the will was signed by the testator. It is not necessary that the testator state, or that the witnesses to know, that the instrument in question was the will of the testator, nor is it necessary for him to acknowledge to

⁸²—*Seofield v. Thomas*, 231 Ill. 114.

⁸³—*St. Mary's Home v. Dodge*, 257 Ill. 518.

them that he had signed it, but it is sufficient if he acknowledge to the witnesses, either by word or by act, that the instrument in question is his free act and deed.⁸⁴

§ 1814. Alteration of Will—Where a testator makes an alteration in his will by erasure or interlineation, or in any other mode, without authenticating such alteration by a new attestation in the presence of witnesses, or other form required by the statute, it is presumed that the erasure was intended to be dependent upon the alteration going into effect as a substitute, and such alteration not being so made as to take effect, the will therefore stands, in legal force, the same as it did before, so far as it is legible after the attempted alteration. So, where there were erasures by pencil which did not obliterate the writing, the will as originally drawn was properly admitted to probate.⁸⁵

§ 1815. Probate of Will Essential to Good Title Thereunder—Under our present statute no will is good or available, for the granting, conveying, and assuring lands, tenements and hereditaments therein devised unless probated and made a matter of record in accordance with the provisions of sections 2 and 10 of our statute on wills or unless all the provisions of section 9 are complied with, including the recording of an exemplified copy of the will, certificate, etc., of the clerk of the probate court where the will was probated, in case the same is probated in a foreign State or country.⁸⁶

§ 1816. Setting Aside Probate of Will on Motion in Probate Court—Where a petitioner files in the probate court his petition to set aside the probate of a will, alleging that he and others were the heirs of the deceased and that they had no notice of her death or of the proposed probate of the will and that the party who filed the application to probate the will knew the name of the petitioner and his resi-

84—Thompson v. Karme, 268 Ill. 168.

86—Barnett v. Barnett, 284 Ill. 580; Beatty v. Clegg, 214 Ill. 34.

85—Schmidt v. Bauermeister, 279 Ill. 504.

dence and that he was an heir but designedly left his name out of the application in order to keep him in ignorance of the proceeding and for the fraudulent purpose of defrauding him of his rights, and pray that the order admitting the will to probate, and that all proceedings thereunder be vacated and set aside, and the prayer of the petition is granted, and the application to probate the will set for a future day, from which order an appeal is taken to the circuit court, where the appeal is dismissed, the circuit court commits no error in dismissing the appeal. The order of the probate court vacating the proceedings and resetting the matter is not a final order or judgment and therefore no appeal could be taken from it. The case was not disposed of by the order vacating the probate of the will. No adjudication was had on the merits of the case and no rights were determined.⁸⁷

There are cogent reasons why a party over whom neither the probate court nor the circuit court acquires jurisdiction should not be required to go into the circuit court and institute proceedings there to set aside the probate of a will for want of such jurisdiction. While such proceedings would be pending in the circuit court, the probate court, in the exercise of its exclusive jurisdiction, would be proceeding with the administration of the estate and disposing of the property in accordance with the will. Inasmuch as a motion or petition in the probate court is the proper proceeding, equity would not afford a remedy, and there is no known method by which the circuit court could interfere with the administration in the probate court or stay its proceeding with a motion while a motion would be pending in the circuit court. The probate court has original jurisdiction in the matter of probate, but to acquire jurisdiction in a particular case a petition for probate of a will must state certain things. The probate court

87—*Scofield v. Thomas*, 226 Ill. 631; *Scofield v. Thomas*, 231 Ill. 114.

would have jurisdiction to entertain the petition to set aside the probate of the will for the reasons stated in the petition so to do.⁸⁸

§ 1817. Custodians of Wills to Produce the Same—Penalty—Statute—“Any person or persons who may have in his or her possession any last will or testament of another, for safe keeping or otherwise, shall immediately upon the death of the testator or testatrix, deliver up said will to the county court of the proper county; and upon a failure or refusal so to do, the county court may issue an attachment, and compel the production of the same; and the person or persons thus withholding any such will, testament or codicil, as aforesaid, shall forfeit and pay \$20 per month, from the time the same shall be thus wrongfully withheld to be recovered in an action of debt for the use of the estate, by any person who will sue for the same, in any court having jurisdiction thereof; and if any person to whom a will, testament or codicil hath been or shall be delivered by the party making it, for safe keeping as aforesaid, shall alter or destroy the same without the direction of the said party, or shall wilfully secrete it for the space of six months after the death of the testator or testatrix shall be known to him or her, the person so offending shall, on conviction thereof, be sentenced to such punishment as is or shall be inflicted by law, in cases of larceny.”⁸⁹

§ 1819. Place of Probate—Statute—“If any testator or testatrix shall have a mansion house or known place of residence, his or her will shall be proved in the court of the county wherein such mansion house or place of residence shall be. If he or she has no place of residence, and lands be devised in his or her will it shall be proven in the court of the county wherein the lands lie, or in one of them, where there shall be land in several different counties; and if he or she have no known place of residence, and there be no

⁸⁸—*Scofield v. Thomas*, 231 Ill.
114.

⁸⁹—Sec. 12, Ch. 148, R. S.

lands devised in such will, the same may be proved either in the county where the testator or testatrix shall have died or that wherein his or her estate, or the greater part thereof shall be.”⁹⁰

The probate of a will in the first instance, should be made in the place of the testator’s residence at the time of his death, whether the will be executed at the place of his domicile or elsewhere.⁹¹

While the rule, generally speaking, is, that a will should be probated in the first instance at the domicile of the testator, it is subject to exception, which is almost as broad as the rule itself, that it may be probated in any county in any State where the testator had and left assets, particularly real estate.⁹²

§ 1820. Wills Proven Without the State—Statute—“All wills, testaments, and codicils, or authenticated copies thereof, proven according to the laws of any of the United States, or the territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this State, accompanied with a certificate of the proper officer or officers that the said will, testament, codicil or copy thereof was duly executed and proved, agreeably to the laws and usages of that state or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law, in like manner as wills made and executed in this state.”⁹³

The rule of the common law as to the execution of wills and proof thereof, that the same should conform to the law of the State where the land is situated is changed by section 9 of our statute on wills as to wills executed and proved without the State where the land is situated. Under that section of the statute a will executed and proved according to the laws of a foreign state and properly recorded in

90—Sec. II, Ch. 148, R. S.

93—Sec. 9, Ch. 148, R. S. 1916.

91—Barnett v. Barnett, 284 Ill. 580.

92—Chicago T. R. R. Co. v. Win-
slow, 216 Ill. 166.

Illinois is "good and available in law, in like manner as wills made and executed in this State." It is not necessary that such will should be probated in this State in order to pass title to a devisee to real estate located here. But before a party can have the benefit of section 9 it is necessary that all the provisions required thereby be complied with.⁹⁴

§ 1821. Wills Executed in Illinois Probated in Foreign State—In case the will is executed in Illinois, in accordance with the laws of that State, in case the will is probated in another State it is not necessary that the proper clerk should certify that it was executed and proved in accordance with the laws of Illinois. The words "agreeably to the laws and usages of that State or country in which the same was executed," in section 9 of the Statute of Wills, are misconstrued if it be claimed that they apply to the State where the will was executed. They apply to the laws and usages of the State where the certificate was executed. The word "same" refers to the certificate and not to the will. The clerk of a foreign State or country could not reasonably be expected to certify that a will was duly executed and proved agreeably to the laws and usages of the State where the will was executed where the will happens to be executed outside of the State where the same was probated.⁹⁵

§ 1822. Probate of Lost or Destroyed Will—It would seem to be well established that a will lost or destroyed after the death of the testator may properly be probated.

A petition to the probate court to admit to probate a lost or destroyed will differs from the ordinary application only in the allegation that the will is lost or destroyed after the death of the testator. The proponent is required under his petition to make the same proof as in any other case under the statute, and in addition, in order to overcome the pre-

⁹⁴—*Barnett v. Barnett*, 234 Ill. 580.

⁹⁵—*Barnett v. Barnett*, 234 Ill. 580.

sumption that the testator had revoked the will in his lifetime, to show that it was in existence at the time of his death, and that it had been lost or destroyed since that time. Lost or destroyed wills can only be established, and the distribution of the estates of decedents determined, on the most satisfactory evidence.⁹⁶

The contents of a lost will cannot be proved by the declarations of the testator alone. Such declarations are admissible only to corroborate the testimony of others who can testify from their own knowledge as to the contents of the will.⁹⁷

This holding is not in conflict with *In Re Page*, 118 Ill. 576, post.

Where a last will and testament, after its execution, is retained by the testator and kept in his possession and after his death cannot be found, the presumption is that the testator destroyed it *animo revocandi*. It will not be presumed that such instrument was destroyed by any other person without the knowledge or authority of the testator, as that would be presuming a crime. In order to overcome the legal presumption that the testator revoked the will he had executed during his lifetime, it is incumbent upon the applicant for the probate of the will to show that it was in existence at the time of the testator's death and that it had been lost or destroyed since that time.⁹⁸

Declarations, written or oral, made by the testator after the execution of his will, are, in the event of its loss, admissible, not only to prove that it has not been cancelled, but also as secondary evidence of its contents. These declarations are admissible to show the continuing existence of the will at the time they are made, and so rebut the presumption of the will having been destroyed, *animo revo-*

96—*St. Mary's Home v. Dodge*, 257 Ill. 518.

97—*Griffith v. Higinbotom*, 262 Ill. 126. Citing: *Clark v. Turner*, 50 Neb. 290. This holding is not in

conflict with *In re Page*, 118 Ill. 576, post.

98—*Griffith v. Higinbotom*, 262 Ill. 126; *St. Mary's Home v. Dodge*, 257 Ill. 518.

candi; when the will, having remained in the custody of the testator, is no longer forthcoming, such declarations are receivable in evidence to show what the will was, so far as known to the testator at the time they were made.¹

§ 1823. Foreign Wills Admitted to Probate—Statute—

“All wills, testaments and codicils, which heretofore have been or shall hereafter be made, executed and published outside of this State, may be admitted to probate in any county in this State in which the testator may have been seized of lands or other real estate, or in which his personal estate or part thereof shall lie at the time of his death, in the same manner, and upon like proof, as if the same had been made, executed and published in this State, whether such will, testament or codicil has first been probated in the state, territory or country in which it was made and declared or not. And all original wills or copies thereof, duly certified according to law or exemplifications from the records, in pursuance of the law of Congress in relation to records in foreign states, may be recorded as aforesaid, and shall be good and available in law, the same as wills proved in such county courts. For the purpose of granting administration of both testate and intestate estates, the situs of specialty debts shall be where the instrument happens to be, and of simple contract debts and other choses in action where the debtor resides.”²

That section provides that the authenticated copy of the will shall be “recorded as aforesaid.” These words mean recorded with the probate clerk as provided by section 2 of the Statute of Wills, and not in the office of the Recorder of the county.³

§ 1824. Probate of Foreign Wills—Statute—“That a will duly proved, allowed and admitted to probate outside this State, may be allowed and recorded in the proper court of any county in this State in which the testator has left any estate.”⁴

¹—In re Page, 118 Ill. 576.

²—Sec. 10, Ch. 148, R. S.

³—Barnett v. Barnett, 284 Ill. 580.

⁴—Sec. I, Laws 1917, p. 800.

§ 1825. Recording Foreign Wills or Copies Thereof Notice—Statute—“Whenever any will, testament or codicil which has been made, executed and published out of this State, or authenticated copies thereof, or exemplifications from the records shall have recorded or admitted to probate in any county in this State in which the testator may have been seized of lands or other real estate or in which his personal estate or a part thereof is situated, in accordance with the provisions of section 9 or 10 of this act, such record or such probate shall be notice from the date of such record or such admitting to probate.”⁵

The provisions of Section 33 of the Conveyance Act providing for the recording of wills probated in a foreign State in the office of the Recorder of Deeds do not operate to convey title to a devisee named in the will, but only operates as notice from the date of filing the same for record as in other cases. The object of section 33 was merely to charge parties with constructive notice of the contents of the will.⁶

§ 1826. Copy of Foreign Will Admitted to Probate on Petition—Statute—“When a copy of the will and the probate thereof, duly authenticated, shall be presented by the executor or by any other person interested in the will, with a petition for probate, the same shall be filed and a time must be appointed for a hearing thereon and such notice must be given as required by law on a petition for the original probate of a domestic will.”

“If upon the hearing it appears to the satisfaction of the court that the will has been duly proved, allowed and admitted to probate outside of this State, and that it was executed according to the laws of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this State, it must be admitted to probate, which probate shall have the

⁵—Sec. 10a, Laws 1919, p. 993.

⁶—*Barnett v. Barnett*, 284 Ill. 580.

same force and effect as the original probate of a domestic will." 7

§ 1827. Copy of Will from States Not Requiring Probate of Wills—Statute—"When a duly authenticated copy of a will from any state or country where probate is not required by the laws of such state or country, with a duly authenticated certificate of the legal custodian of such original will that the same is a true copy, and that such will has become operative by the laws of such state or country, and when a copy of a notarial will in possession of a notary in a foreign state or country entitled to the custody thereof (the laws of which state or country require that such will remain in the custody of such notary), duly authenticated by such notary, is presented by the executor or other person interested to the proper court in this State, such court shall appoint a time and place of hearing and notice thereof shall be given as in cases of an original will presented for probate.

"If it appear to the court that the instrument ought to be allowed in this State, as the last will and testament of the deceased, the copy shall be filed and recorded, and the will shall have the same effect as if originally proved and allowed in said court." 8

§ 1828. Titles Acquired Under Recorded Foreign Wills Validated—Statute—"In all cases where wills, testaments, codicils or authenticated copies thereof, or exemplifications from the records thereof, proven according to the laws of any of the United States, or territories thereof, or of any foreign country, and touching or concerning estates within this State accompanied with the certificate of the proper officer or officers that said will, testament, codicil or copy thereof was duly executed and proved agreeably to the laws and usages of that state, territory or country in which the same was executed shall have been filed for record before the taking effect of this act, in the office of the re-

7—Sec. 3, Laws 1917, p. 801.

8—Sec. 4, Laws 1917, p. 801.

corder of deeds of the county in this State in which the testator shall have been seized of lands or other real estate, or in which his personal estate or a part thereof shall lie, such recordations shall be and the same are hereby declared to be legal and valid and all titles passed and acquired under the terms of such wills, testaments or codicils shall be and the same are hereby validated and given the same force and effect in law and in equity as if such wills, testaments and codicils had been recorded in accordance with the provisions of this Act, in the office of the county or probate clerk, as the case may be, of the proper county." 9

§ 1829. Administration of Estates of Non-Residents—If a non-resident of Illinois dies testate leaving property in this State, a relative of such deceased residing in Illinois is entitled to nominate a resident of Illinois to administer the estate under letters of administration with the will annexed as against the public administrator of the county where there is property of the deceased.¹⁰

§ 1830. Construction of Wills—Rules Considered—All rules of construction are simply means to a given end, being those methods of reasoning which experience has taught are best calculated to lead to the intention, and generally no rule will be adopted which leads to the defeat of the intention. So, whatever may have been the earlier doctrine, it is now thoroughly settled that technical rules of construction are not favored and must not be applied so as to defeat the intention. In modern times the more sensible rule obtains, in all cases, to ascertain and give effect to the intention of the parties as gathered from the entire instrument together with the surrounding circumstances, unless such intention is in conflict with some unbending canon of construction or settled rule of property or is repugnant to the terms of the grant. All parts of the deed must be construed and harmonized, if possible.¹¹

9—Sec. 10b, Laws 1919, p. 993.

11—Anderson v. Stewart, 285 Ill.

10—Krome v. Halbert, 263 Ill. 172. 605.

§ 1831. Little Benefit Derived from Adjudicated Cases in Construing Wills—It has been remarked that a court derives but little assistance in determining the meaning to be given to various terms and expressions used in wills from the examination of adjudged cases. No two wills are prepared alike, and the conditions which surround one testator differ so widely from those which surround another that the conclusion reached in one instance is rarely of great service as a guide in another.¹²

§ 1832. Intention of Testator to Be Ascertained—Subject to the exception of the rule in Shelley's case the principle is firmly established and universally recognized that a will should be so constructed as to effectuate the intention of the testator as far as possible, and, in case of doubt, the scope of the instrument should be considered, and its various provisions compared, one with another, in ascertaining such intention. Under its influence, the express words of a will must sometimes yield to the manifest intention of the testator; and even words will be added where it is necessary to effectuate such intention. But courts, under the pretense of construction, have no right either to reject or supply words, except where it is absolutely necessary to avoid an absurdity or give effect to the manifest intention of the testator; for courts have no right to make a will either by rejecting some of its provisions or by adding new ones nor by placing upon its provisions an arbitrary construction.

The general rule is, that, where it can possibly be done, a will should be so construed as to give effect and operation to every word and provision of it.¹³

Technical rules should not be permitted to defeat the intention of the testator. In interpreting wills those rules should be followed that are most in harmony with the genius and laws of the country and the manners and customs of its

¹²—*Bergman v. Arnhold*, 242 Ill. 218.

¹³—*Welsch v. Belleville S. Bank*, 94 Ill. 191.

people. Those rules should be followed that would effectually do justice, and not by such as would give an arbitrary and technical meaning to words never understood or contemplated by the testator.¹⁴

The intention of a testator which is to be sought for is not that which may have existed in the mind of the testator not expressed in his will, but that which is so expressed.

In seeking the intention of the testator it is always presumed that he intended by his will to dispose of all his property and to leave no part of it intestate estate, and this presumption is so strong that the court will accept any reasonable construction of the will rather than hold the testator intended to die intestate as to any of his property. Where a testator in disposing of his property overlooks a particular event, which, had it occurred to him, he would have in all probability provided against, the court will not supply a provision by intendment, on a presumption of what the testator would naturally have done.¹⁵

§ 1833. Nature of Estate Devised—Policy of Law to Invest a Fee—It is the policy of the law, as announced by section 13 of the Conveyance Act, and by many decisions of the court, that every estate shall be deemed to be an estate in fee, unless a contrary intention is clearly expressed. Where a testator in his will employs language sufficient to pass a fee simple to the land, in the absence of the expression of a clear intention to cut down the fee to a life estate, an estate in fee simple will pass. The rule is, the intention of the testator, if clearly disclosed by the will, must prevail even though some words must be rejected to give effect to that intention.¹⁶

It is the disposition of courts to adopt such a construction as will give an estate of inheritance. If personal prop-

14—Walker v. Walker, 283 Ill. 11. 201 Ill. 292; Rose v. Hale, 185 Ill.

15—Moeller v. Moeller, 281 Ill. 397. 378; Williamson v. Carnes, 284 Ill.

16—Hemstead v. Hemstead, 285 Ill. 521.

Ill. 448. Citing: Bowen v. John,

erty is included in the instrument disposing of lands, it is a circumstance indicating that the disposition is an absolute one in fee.¹⁷

§ 1834. Devise of Rents, Issues and Profits Equal to Devise of the Land—It is true that the courts have held, that a devise of the rents, income and profits of land is equivalent to a devise of the land itself. But a devise of the rents, income and profits of land is not always equivalent to a devise of the fee estate in the land. Whether or not the interest given by a will is a fee simple interest, depends upon the question whether a less estate is limited or not. So a devise of the rents and profits of land to the devisees during their natural lives is a devise of the property to them during their natural lives.¹⁸

§ 1835. Devise of Life Estate with Power of Disposition—The rule is, that where a will devises a life estate with general language indicating a power of disposal, although the life tenant could dispose of the estate devised without express power, the power is regarded as only pertaining to the estate devised and is to be interpreted as meaning such disposition as a tenant for life could make. (Citing a number of authorities.) If, however, the will indicates an intention to confer power to convey a fee, effect will be given to such intention, but the exercise of the power will not change the devise of a life estate into a fee. (Citing a number of authorities.)

So where a will gave a life estate to the wife of a son of the testator, with a remainder to the children of such son, and by a codicil the life tenant was vested with the power to convey the property in fee, the codicil did not revoke the devise of the remainder to the children of her husband, and at her death his children, in case of a sale, would be entitled to the remainder of the property in its altered form. In case of a sale she would be entitled to the

17—*Lelter v. Sheppard*, 85 Ill. 242;
Giles v. Anslow, 128 Ill. 187.

18—*Morrison v. Schorr*, 197 Ill.
554; *Howe v. Hodge*, 152 Ill. 252.

possession of the proceeds, with the right to enjoy the income during the continuance of her estate, but as to the principal she would occupy a trust relation to those entitled to the remainder.¹⁹

It is well settled law in this State that where the first taker is given a life estate, only, with power to consume the whole or a part of the estate, or even to dispose of it during his life by will or otherwise, the gift or devise over, after the life estate, is not rendered invalid because of the uncertainty as to the quantity of the residuary estate.²⁰

§ 1836. **Vesting of Estates Under Devise**—Public policy, as declared by numerous decisions, dictates that where estates are devised by will they are to be regarded as vesting immediately, unless the testator has by clear words manifested an intention that they shall be contingent on a future event.²¹

The law favors the vesting of estates and in cases where the instrument is susceptible of two constructions the law is inclined to favor the construction most favorable to the devisee rather than the construction that would be against his interest.²²

Estates legal or equitable given by will should always be regarded as vesting immediately unless the testator has by very clear words manifested an intention that they should be contingent on a future event.²³

§ 1837. **Repugnant Provisions in Wills**—A latter clause in a will is to be considered, when repugnant to a former clause, as intending to modify or abrogate the former clause.

In such case we are to presume that, having reconsidered the former provision, the testator was not satisfied with it,

19—Barton v. Barton, 283 Ill. 338.

20—Dean v. Northern Trust Co., 266 Ill. 205. Citing: Harvard College v. Balch, 171 Ill. 275; Hawkins v. Bohling, 168 Ill. 214; Skinner v. McDowell, 169 Ill. 265; Beavans v. Murray, 251 Ill. 603.

21—Hull v. Hull, 286 Ill. 75.

22—Sheridan v. Blume, 290 Ill. 508.

23—Williamson v. Carnes, 284 Ill. 521.

and, by the latter clause, intended more fully and accurately to express his intention. It is more reasonable to indulge in this presumption than to suppose that he designedly made two repugnant provisions that could not be harmonized, or both carried into effect.²⁴

But the repugnancy must be clear and unambiguous to be effective. It is the policy of the courts in construing wills to consider all its parts together, and, if possible, to give each clause and provision effect, according to the intention of the testator. And when ascertained the intention of the testator must be enforced.²⁵

The rule that where there are inconsistent clauses in a will the last prevails is only applicable where the real intention of the testator cannot be discovered and where the two provisions are so utterly inconsistent that it is impossible for both to coincide with the general intention of the testator.²⁶

Where the intention of the testator, as clearly gathered from the will, is, that a less estate shall be taken by the devisee, it is wholly immaterial in what part of the will such intention is manifested.²⁷

The rejection of one clause of a will to uphold another, on the ground that the two clauses are repugnant, is a desperate remedy, to be resorted to only in case of necessity. Every effort should be made by the court to reconcile clauses apparently repugnant that effect may thereby be given to each.

Where there is a general devise of property in one part of a will and a specific disposition of the property in another part, the latter is generally regarded as excepted out of the general devise.²⁸

A construction of a deed or other instrument which re-

24—*Murfit v. Jessup*, 94 Ill. 158.

25—*Brownfield v. Wilson*, 78 Ill.

467; *Morrison v. Schorr*, 197 Ill. 554;
Wimbush v. Wimbush, 253 Ill. 407.

26—*Sheridan v. Blume*, 290 Ill.
503.

27—*Morrison v. Schorr*, 197 Ill.
554.

28—*Dee v. Dee*, 212 Ill. 338.

quires the rejection of an entire clause is not to be admitted, except from unavoidable necessity. But the intention of the parties, as manifested in the language of the instrument, should, as far as practicable, be carried into effect.²⁹

Where the owner of property, by his deed to his children and "their heirs at law" used the words "meaning and intending by this conveyance to convey to my said children the use and control of said real estate during their natural lives, and at their death to go to their children; should they die without issue, to their legal representatives:" it was held that by the use of these words the grantor used the word heirs, not in its legal sense, but as meaning children.³⁰

§ 1838. **Ambiguities in Wills**—Extrinsic evidence is admissible to determine the existence of latent ambiguities in a will, and to enable the court to look upon the will in the light of surroundings and circumstances of the testator at the time the will was made, for the purpose of determining his intention, but not to change its terms. A latent ambiguity is defined to be one "which arises not upon the words of the will, deed or other instrument, as looked at in themselves, but upon those words when applied to the object or subject which they describe." A latent ambiguity can only arise by evidence *dehors* the record, and it is frequently stated that because of this fact extrinsic evidence *dehors* the record, of some character, may be resorted to for its removal. A latent ambiguity which may be removed by extrinsic evidence may arise either when the will names a person as the object of a gift or thing as the object of it, and there are two persons or things that answer such name or description, or, second, where the will contains a misdescription of the object or subject, as where there is no such thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator; where it consists of a misdescription, if the misdescrip-

29—Mittel v. Karl, 133 Ill. 65; 30—Griswold v. Hicks, 132 Ill. 494.
Riggin v. Love, 72 Ill. 556.

tion can be stricken out and enough remains in the will to identify the person or thing the court will deal with it in in that way, or if it is an obvious mistake read the will as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift. In such a case evidence is always admissible to show the condition of the testator's family and estate and the circumstances by which he was surrounded at the time of making his will. Where the words of a will aided by the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended and it will be void for uncertainty. It often becomes necessary to prove by extrinsic evidence whether or not the testator had property answering to the exact description in the will, and if not, what property he did have which sufficiently answers such description. The books abound in cases in which wills have been upheld although the subject matter has been indefinitely or inaccurately described. Although a latent ambiguity does not render an instrument void, yet it may be as fatal as a patent ambiguity. This is true where the extrinsic evidence proves entirely unsatisfactory and results in leaving the matter wholly to conjecture. While extrinsic evidence of the circumstances, situation and surroundings of the testator and of his property is legitimate to place the court which expounds the will in the situation of the testator and thus to enable the court to understand the meaning and application of his language, yet the intent must be determined from the language of the instrument as explained by such extrinsic evidence, and no proof, however conclusive in its nature, can be admitted with a view of setting up an intention inconsistent with the writing. There can be no question that under our decisions and the weight of authority in other jurisdictions the general rule is, that oral proof is not admissible to reform, alter, detract from

or add to the terms of a will, but the court may hear such evidence for the purpose of understanding the circumstances by which the testator was surrounded.³¹

§ 1839. False Description of Lands Devised—Our Statute of Wills requires every last will and testament to be in writing, signed by the testator and duly witnessed. The courts are firmly committed to the doctrine that extrinsic evidence is never admissible for the purpose of varying the intent of the testator as expressed by the will itself, and that no words whatever can be added to or taken from the will that will have the effect of changing the plain meaning of the testator as expressed in his will. (Citing a large number of authorities.)

So where the testator devised lands which he did not own, owing to a misdescription of the lands which he did own, the court says the correct rule in such case is laid down in Page on Wills, as follows: "It not infrequently happens that a testator devises land by a description which is correct in some respects and erroneous in others. This most frequently happens where he attempts to describe the land devised by a reference to its location in a given county, or its lot number in a given plat, or its location in a specified section of a government survey. Practically all the courts agree that if, after a false description or a part of a description is discarded there remains in the devise language sufficiently full and accurate to identify the subject of the gift with sufficient certainty the property there indicated will pass. If, on the other hand, where the false description is eliminated from the will there is not enough left to afford a basis for identifying the subject of the gift nothing will pass. If the will describes the property by reference to the person from whom the testator acquired it, or by its location with reference to well known objects, or by reference to the name which popularly attaches to the property, the fact that a further description

31—*Alford v. Bennett*, 279 Ill. 375.

contains an erroneous lot number or a reference to a wrong part of the government survey does not avoid the valid and accurate description already given. So where testator showed by his will a clear intention of disposing of the whole of his real estate, as where he devises 'my real estate' or 'all my lands,' the addition of a further and more particular erroneous description does not avoid the effect of the general description."

So after the elimination from the description of a devise of land that part of the description which is claimed to be erroneous the description remaining is such that no surveyor could locate the land, under the rule stated by Page the devise does not pass.³²

§ 1840. Supplying Omitted Words in Will—If it be plain that certain words have been omitted from the will the insertion of which would effectuate the obvious intention of the testator such words might be supplied by the court. But in the interpretation of wills the court cannot indulge in conjecture as to the supposed intention of the testator, or add words to his will to express an intention which is not plain and unmistakable.³³

§ 1841. Words Dispositive or Precatory in Wills—The test whether or not words used in a devise are dispositive or merely precatory is, does the testator mean by such words to control the disposition of the property? If so, it is his will no matter how mildly the wish is expressed. But if he simply indicates by such words what he regards as a wise disposition, leaving it to the discretion of the person taking the legal title to the property to dispose thereof, then it is not his will.³⁴

§ 1842. Construction of Certain Words and Phrases in Wills—The words "bodily heirs" employed by a testator have a technical, legal meaning as a limited class of the heirs appointed by law to succeed to the real estate in case

32—Stevenson v. Stevenson, 285 Ill. 486.

34—Hemstead v. Hemstead, 285 Ill. 448.

33—Jordan v. Jordan, 281 Ill. 421.

of intestacy, and they are to be given that meaning where there are no words in the will which in any way limit or qualify them. Where uncontrolled and unexplained by the context they are to be interpreted according to their technical meaning. They are, however, used frequently with a different meaning, and the purpose of construction being to ascertain the intention of the testator as expressed in his will, if it is found that the words were used with a different meaning, effect will be given to the intention where it does not violate any settled rule of law or principle of public policy. Accordingly it has been found in various cases that the words were employed by the testator as meaning children and will have been construed in order to effectuate his intention.³⁵

The intention of the testator must be the controlling factor as to the meaning to be given to the word "heir" or the phrase "heir-at-law," for it is fundamental that in construing wills the constant effort of the courts is to give effect to the true intention and meaning of the testator as expressed by the language used in his will, and this is to be ascertained from a consideration of the will in all its parts and details, bearing in mind the scope and plan of the testator as expressed by the whole will.³⁶

The word "children," in its ordinary significance, denotes immediate offspring, and will not be construed to mean grandchildren unless a strong case of intention or necessary implication requires it. The word "children," in both its technical and general sense, is a word of purchase and not a word of limitation.³⁷

It is always competent to show that the word "heirs" or "heirs of body" are used in a will as synonymous with "children," and for that purpose every part of the will is to be taken into consideration.³⁸

35—Hull v. Hull, 286 Ill. 75.

36—Walker v. Walker, 283 Ill. 11.

37—Hanes v. Central Ill. Utilities Co., 262 Ill. 86. Citing: Arnold v.

Alden, 173 Ill. 229; Martin v. Modern Woodmen, 253 Ill. 400.

38—Summers v. Smith, 127 Ill. 645.

The rule is too well established to require discussion that the expression "after the death" as used in wills, refers to the time of enjoyment, and not to the vesting of the estate.³⁹

When a gift over is preceded by a particular estate the gift over will usually take effect if the contingency happens at any time during the period of the particular estate, and in such case "death without issue" means death before the death of the life tenant, unless the will shows that the testator intended to refer to a later date than the determination of the life estate.⁴⁰

The meaning of the word "unmarried" is never having been married, but circumstances may show that it was used in the sense of not having a husband or wife living at the time of death.⁴¹

§ 1843. Technical Words Used Technically—It is a well settled rule of construction that technical words are presumed to be used technically unless the contrary appears upon the face of the instrument and that words of a definite legal signification are to be understood as used in their definite legal sense.⁴²

While the legal and technical meaning of the word "descend" is to pass by inheritance by operation of law, but where it is clear that a testator used it as meaning that the title should pass, by virtue of his will, in like manner as property descends without a conveyance, and as distinguished from a conveyance or grant, it will be so considered.⁴³

§ 1844. Words Indicating Legacy or Device Used Interchangeably—The word "legatee" is a word used in wills to indicate one who takes personal property, and the word "devisee" strictly means the donee of real estate, but not infrequently they are used interchangeably.⁴⁴

39—Lynn v. Worthington, 266 Ill. 414.

40—Welch v. Crowe, 278 Ill. 244.

41—Frail v. Carstairs, 187 Ill. 310.
Citing: Peters v. Blake, 170 Ill. 304.

42—Aetna L. I. Co. v. Hoppin, 249 Ill. 406.

43—Harvey v. Ballard, 252 Ill. 57.

44—Weigel v. Green, 218 Ill. 227.

And the words "bequeath" and "devise" may be and frequently are used as synonymous.⁴⁵

§ 1845. Separating Valid and Invalid Portions of Wills—The rule is well established that where valid and invalid portions of a will are so related to the general scheme of the testator as to be interdependent, so that they cannot be separated without doing violence to the testamentary plan, the entire disposition must fail. The converse of this rule is equally established, that where the invalid portions can be separated from those which are valid and still give effect to the general testamentary scheme, the invalid clauses will be disregarded and those which are valid upheld. This rule is not affected by the relative position of the different clauses of the will. In case of repugnancy between two different clauses some of which are valid and some invalid, the question is whether the invalid clauses can be rejected and the general testamentary intent carried out by giving effect to the valid clauses.⁴⁶

§ 1846. Devise to a Class—A class, in the ordinary acceptance, is generally understood to mean a number of persons who stand in the same relation to each other or to the testator. A gift to a class has been defined as a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift to be ascertained at a future time, and who are all to take in equal or some other proportion, the share of each being dependent for its amount upon the ultimate number of persons.

A devise to a class must be to a number of persons answering the same general description or having some common characteristic or relation to the testator. Prima facie, a gift to a class is one consisting of persons who are included and comprehended under some general description

45—Rickman v. Meier, 213 Ill. 507.

46—Carpenter v. Hubbard, 263 Ill. 571. Citing: Eldred v. Meek, 183 Ill. 26; Laurence v. Smith, 163 Ill.

149; Reid v. Voorhees, 216 Ill. 236;

Johnson v. Preston, 226 Ill. 447;

Burke v. Burke, 259 Ill. 262.

and bear some relation to the testator or have some common relation to each other, and there is nothing in the context of the will which would justify the application of a different doctrine.⁴⁷

Where a devise is to a class and nothing in the will shows a contrary intention, the members of the class will be determined upon the death of the testator and the persons answering the description at that time will be included. But the testator may by his will, expressly or by necessary implication, fix the time when the members of the class are to be ascertained at a period other than at his death, if the time fixed is not so remote as to violate the rule against perpetuities.⁴⁸

A devise is not a gift to a class where at the time of making it the number of devisees is certain and the share each is to receive is also certain, and in no way dependent for its amount on the members surviving when the contingency happens.⁴⁹

Where a particular estate is carved out, and the gift is thereupon to a class, such as to the children of a person to whom the particular estate is devised or the children of any other person, the gift will embrace not only those living at the death of the testator but also those who may come into existence down to the time of distribution. Children coming into existence after that time are not included.⁵⁰

A testator devised a life estate to his wife and after her death to one of his sons and his children, but if the son died leaving no issue then to the children living of another son share and share alike. The estate devised to the son and his children was not immediate but was to take effect upon the termination of the life estate. The language used precludes the construction that the estate took effect at the death of the testator, and if the son then had no children he

47—Blackstone v. Althouse, 278 Ill. 481.

48—Way v. Geiss, 280 Ill. 152.

49—Blackstone v. Althouse, 278 Ill. 480.

50—Way v. Geiss, 280 Ill. 152.

became seized in fee of the entire estate. The language of the will is plain that the devise to the son and his children was after the death of the widow, but if he be dead,—that is if the son be dead before the termination of the life estate leaving no children,—the land to go to the children of another son living at that time. The devise to the son and his children was to a class, and the persons belonging to that class were to be determined at the determination of the particular estate. If, when the time arrived, the son were dead leaving no child or children, the devise over was to take effect. To give the will the construction that the son first named took an estate in fee simple at the death of his father, would defeat the plainly expressed intention of the testator.⁵¹

The general rule is, that where a testator makes a devise or gift of property to certain persons or the survivors of them and by the same instrument creates a particular estate and postpones the period of distribution until the determination of such prior estate, the gift or devise to such survivors will take effect and be vested only in those of the class who shall survive the determination of the particular estate and answer the description at that time.⁵²

If a gift is to a class, those members of the class who are in being when the gift takes effect will take all to the exclusion of predeceased members of the class, with the statutory exception in favor of a child or grandchild who shall die before the testator and where no provision is made for the contingency.⁵³

§ 1847. Charges Imposed on Devises by Will—It is well established that where the intention of the testator to charge his real estate with the payment of specific legacies is clear, either from express words of the will or by necessary implication from the language used, legacies will be held

51—*Way v. Geiss*, 280 Ill. 152.

53—*Blackstone v. Althouse*, 278 Ill.

52—*Jones v. Miller*, 283 Ill. 348. 481.

(Citing a number of authorities.)

to be a charge upon the real estate. So where the residuary clause of a will provided that "all the rest and residue of my estate that shall remain after the satisfaction of the above legacies and payment of my just debts and funeral expenses" was given to certain parties, it was held that the specific legacies were a charge upon the real estate.⁵⁴

Where a legacy is given and is directed to be paid by the person to whom the real estate is devised, such real estate is charged with the payment of the legacy, and the rule is the same where the legacy is directed to be paid by the executor, who is the devisee of the real estate. If the devisee, in such case, accepts the devise, he becomes personally liable to pay the legacy and he becomes thus bound even though the land devised to him proves to be less in value than the amount of the legacy. If he desires to escape the responsibility, he must refuse to accept the devise. If he does accept, he becomes bound to pay the whole amount of the legacy, which he is directed to pay. The payment of the legacy can be enforced by a suit in equity against the real estate, or by a common law action directly against the devisee upon the implied promise to pay it—a promise implied by his acceptance of the devise.⁵⁵

§ 1848. Devises for Charitable Purposes—It is well settled in this State that conveyances and devises to charitable uses are not within the rule against perpetuities. The Statute of Charitable Uses (43 Eliz. chap. 4) is a part of the common law of this State. Gifts to charity are looked upon with favor by the courts. Every presumption consistent with the language used will be indulged in to sustain them. A charity in a legal sense may be more fully defined as a gift, to be applied, consistent with the existing laws for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease,

54—*Simonsen v. Hutchinson*, 231 Ill. 508.

55—*LaValle v. Droit*, 179 Ill. Ap. 484.

suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burden of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.⁵⁶

§ 1849. Solicitor's Fees Allowed in Suits for Construction of Wills—The general rule as to solicitor's fees in cases concerning the construction of wills is, that where the testator has expressed his intention in his will so ambiguously as to make it necessary to go into court to get a construction of the will in order to determine which of two or more adverse claims to the same fund or property is valid, the cost of the litigation should be borne by the property or fund in question.⁵⁷

§ 1850. Appeal from Probate Court to Circuit Court—Trial De Novo—Statute—“Appeals may be taken from the order of the county court, allowing or disallowing any will to probate, to the circuit court of the same county, by any person interested in such will, at the same time and manner as appeals may be taken from justices of the peace, except that the appeal bond and security may be approved by the clerk of the county court; and the trial of such appeals shall be de novo.”⁵⁸

The trial is de novo without regard to the fact that the instrument has been admitted to probate. The certificate of the oath of the witnesses at the time of the probate may be offered in evidence by either party; but it is to receive such weight only as the jury may think it deserves in connection with the other proof in the case.⁵⁹

On an appeal to the circuit court from an order of the

56—*Skinner v. Northern Trust Co.*, 288 Ill. 229. Citing: *Heuser v. Harris*, 42 Ill. 425; *Crerer v. Williams*, 145 Ill. 625; *Franklin v. Hastings*, 253 Ill. 46; *Andrews v. Andrews*, 110 Ill. 223; *Welch v. Caldwell*, 226 Ill.

488; *French v. Collins*, 252 Ill. 243; *Jackson v. Phillips*, 14 Allen. 556.

57—*Dean v. Northern Trust Co.*, 266 Ill. 205.

58—Sec. 14, Chap. 148, R. S.

59—*Rigg v. Wilton*, 13 Ill. 15.

probate court refusing the probate of a will it is improper to submit the question to a jury, since the statute does not provide for a jury trial and the question is solely for the court.⁶⁰

The relation of the probate court and the circuit court in matters pertaining to the probate of wills are peculiar and different from their relations as to ordinary litigation. The probate court, both by the constitution and statute, has exclusive original jurisdiction in all matters concerning the probate of wills. The statute allows an appeal to the circuit court from any order of the probate court allowing or disallowing probate of will; but the appeal is a limited one, confined to the single question of the validity of the will. An appeal does not transfer the administration of the estate, or the jurisdiction over the estate or property, to the circuit court. Nothing is transferred by the particular order appealed from, and when that is disposed of, the order of the circuit court in relation thereto is transmitted to the probate court, together with the original will and probate, and the probate court is again possessed of full and complete jurisdiction over the administration and the parties. If probate is refused by the probate court, and on appeal to the circuit court the will is admitted to probate, it is so admitted in the probate court by order of the circuit court; but the probate of the will in the probate court is not final and complete until the certified copy of the order of the circuit court has been filed in the probate court. The statute provides that all original wills, together with the probate thereof, shall remain in the office of the clerk of the probate court. The word "probate" as there used, means the legal proof of the due execution and validity of the will, and by statute it must be filed in the office of the clerk of the probate court and remain there. An appeal has the effect to suspend the order of the probate court, but it has no other

⁶⁰—*Scofield v. Thomas*, 231 Ill.

effect, and when the circuit court has made its order and transmitted it to the probate court complete jurisdiction is re-acquired, and there is no further power, authority or jurisdiction in the circuit court.⁶¹

§ 1851. Evidence in Case of Appeal—Statute—“When the probate of any will and testament shall have been allowed or refused by any county or probate court, and an appeal shall be taken from the order or decision of such court, allowing or refusing to admit such will to probate, into the circuit court of the proper county, as provided by law, it shall be lawful for the party seeking probate of such will to support the same, on hearing in such circuit court, by any evidence competent to establish a will in chancery; and in case probate of such will shall be allowed on such appeal, it shall be admitted to probate, liable, however, to be subsequently contested, as provided in case of wills admitted to probate in the first instance.”⁶²

In probating a will on the hearing in the probate court only the testimony of the subscribing witnesses can be heard, but on appeal to the circuit court the hearing of the case the court is not confined to the testimony of the subscribing witnesses, but may hear and consider any legitimate evidence that might be resorted to in establishing a will in chancery.⁶³

If, however, the will is admitted to probate by the probate court, on an appeal to the circuit court the proponents are limited to the testimony of the subscribing witnesses.⁶⁴

§ 1852. Practice in Case of Improper Appeal—The statute provides that an appeal from an order allowing or disallowing probate of a will shall be taken at the same time and manner as appeals from justices of the peace, except the appeal bond and security may be approved by the clerk

61—Scofield v. Thomas, 231 Ill. 114.

62—Sec. 13, Chap. 148, R. S.

63—Kaul v. Lyman, 259 Ill. 30;

Gould v. Chicago Theo. Seminary, 189 Ill. 282; Dubach v. Jolly, 279 Ill. 530; Flynn v. Flynn, 283 Ill. 206.

64—Mead v. Presbyterian Church,

of the county court. Section 33 of the act concerning fees and salaries provides that it shall be the duty of justices of the peace not to allow an appeal unless the fee of \$10 for the use of the clerk of the court to which the appeal is taken shall be paid. So where the appellant fails to pay such fee the appeal is improperly allowed. But if the appellee pays the fee and the same is repaid to him by the appellant in the appellate court and he accepts the same he waives his right to have the appeal dismissed, and it is not error for the appellate court to refuse to dismiss the appeal on the ground it was improperly allowed.

Where on an appeal from the probate court on the probate of a will if the appeal bond is made to an improper party, the proper practice would be to procure a rule on the appellant to file a proper bond, and only to dismiss the appeal, on his failure to do so.⁶⁵

While it may be erroneous for the circuit court to submit to a jury on an appeal from the probate court on a petition to admit to probate a lost or destroyed will, the question of fact involved, yet if the party complaining of such error did not object in the circuit court to the empaneling of a jury he will not on appeal be permitted to raise that question.⁶⁶

§ 1853. Appeals; in Cases of Contest of Wills—In a proceeding to contest a will by a bill in chancery, where the will purports to dispose of real estate or real and personal property, the appeal lies direct to the Supreme Court for the reason that a freehold is involved. But where the will purports to dispose of personal property the appeal goes from the trial court to the Appellate Court for the reason that a freehold is not involved.⁶⁷

§ 1854. Contest of Will—Statute —“Provided, however, that if any person interested shall within one (1) year after

229 Ill. 526; *Thompson v. Owen*, 174 Ill. 229.

66—*St. Mary's Home v. Dodge*, 257 Ill. 518.

65—*Scofield v. Thomas*, 231 Ill. 114.

67—*Dowie v. Sutton*, 227 Ill. 183.

the probate of such will, testament or codicil in the County Court aforesaid, appear and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury in the Circuit Court of the county wherein such will, testament or codicil shall have been proven and recorded as aforesaid, according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate, subject to the provisos hereinafter set forth, shall be forever binding and conclusive on all persons concerned, saving to infants or non compos mentis, the like period after the removal of their respective disabilities." ^{67a}

There was a right to contest a will at common law but no method was provided for a single contest. Where lands were devised and the heir or devisee brought suit, the devisee claiming under the will was required to prove it as well as the capacity of the testator to make a devise, and there could be a contest every time a will was offered in evidence. Our statute provides for a contest by the filing of a bill in chancery wherein an issue of law is to be made up whether the writing purporting to be the will of the testator is his will or not, and the issue to be tried according to the practice in courts of chancery.⁶⁸

The power of a court of equity to try and determine whether the writing produced be the will of the testator or not, includes the power to adjudge upon the validity of any part of the instrument as well as the whole.⁶⁹

The right to file a bill to set aside a will and codicil and the probate thereof is not assignable, and does not pass by inheritance.⁷⁰

67a—Laws 1919, p. 991.

68—Ravenscroft v. Stull, 280 Ill. 406.

69—Wolf v. Bollinger, 62 Ill. 368;

Wood v. Wood, 263 Ill. 285.

70—Staudé v. Tscharnier, 187 Ill. 19.

§ 1855. **Usual Grounds for Contesting Wills**—The usual grounds for contesting wills are the want of testamentary capacity in the testator and undue influence exercised upon him by some party benefited by the will; it is extremely difficult to draw an exact line of demarcation between them, and frequently they run together; under the head of undue influence may also be included the subject of duress.

§ 1856. **Testamentary Capacity of Testator** may be defined to be that state or condition of mind of the party making the will to understand that he is executing a document which disposes of his property after his death; it may be true that no case can be found which gives this exact definition, but it is to be gathered from the consideration of the cases cited. In Washburn on Real Property it is stated: "The difficulty is in fixing or applying anything like a uniform test of standard. * * * He must undoubtedly have sufficient active memory to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their more obvious relations to each other, and to be able to form some rational judgment in relation to these."⁷¹

The Statute on Wills provides that the testator must be "of sound mind and memory."⁷²

And Bouvier defines "Capacity" to be the ability, power, qualification, or competency of a person, natural or artificial, for the performance of civil acts depending on their state or condition as defined and fixed by law."

It is difficult to define an insane delusion which will render one incapable of making a will. In its simplest form a delusion may be said to be a belief in a state or condition of things the existence of which no rational person would believe.⁷³

There are few questions presented to the courts for de-

71—3 Wash. on Real Prop. 686-434.

72—Sec. 1, Chap. 148, R. S.

73—Louby v. Key, 258 Ill. 558.

cision more difficult of determination than that of mental capacity to execute a will or make a valid deed or contract. Especially is this true where the issue depends upon the testimony of non-expert witnesses, such as neighbors and associates, who too often base their conclusions as to soundness or unsoundness of mind upon what they see and observe of physical conditions, particularly those relating to old age.⁷⁴

To justify the finding of insanity in the making of a will the evidence must preponderate in favor of unsoundness of mind, and the presumption of sanity must prevail if the evidence is only sufficient to raise a doubt as to such sanity.⁷⁵

It cannot be said, as a matter of law, that because incapable of transacting ordinary business a person is incapable of making a testamentary disposition of his estate; the real question to be submitted to the jury is, not whether the party has sufficient capacity to comprehend and transact ordinary business, but did he, at the time of making the instrument, purporting to be his will, have such mind and memory as to enable him to understand the particular business in which he was then engaged. If the mind and memory of the testator are sufficiently sound to enable him to know and understand the extent and amount of his property, and his just relations to the natural objects of his bounty, and the business in which he is engaged at the time of executing his will, then he is of sound mind and memory within the meaning of the law.⁷⁶

It is not true that one must have sufficient mind and memory to attend to ordinary business, which involves a contest of judgment and experience and the exercise of mental powers in dealing with other persons, to make a testamentary disposition of property.

A less degree is sufficient for the execution of a will than for the making of contracts and the transaction of ordinary business involving a contest of reason, judgment, experience

74—*Bishop v. Hilliard*, 227 Ill. 382.

76—*England v. Fawbush*, 204 Ill.

75—*Grace v. Grace*, 270 Ill. 558.

384.

and the exercise of mental powers not at all necessary to the testamentary disposition of property. But a party to a will contest has the right to ascertain and present to the jury any fact in relation to the mental capacity of the testator and the strength of his mental powers. Witness may be asked as to the mental ability of the testator to transact ordinary business, as that is one of the elements to be considered in determining whether he had the capacity to make a valid will. Such evidence is competent and legitimate, but the jury must finally determine the question of the testamentary capacity under the rule of law and with the proper test.⁷⁷

If he was able to remember who were the natural objects of his bounty, recall to mind his property and make a disposition of it understandingly, according to some purpose or plan formed in his mind, he was possessed of testamentary capacity.⁷⁸

Unless the testator's conduct proved the existence of an insane delusion it would be no reason for setting aside the will. Injustice, unfairness, prejudice or anger, without a reasonable cause, do not disqualify any person from making a valid will.⁷⁹

Although a testator in his will may make an unnatural and unequal distribution of his property, and the fact that the testator was sick, feeble and advanced in years and suffering from disease, these are not sufficient, standing alone and of themselves to defeat the will.⁸⁰

The use of intoxicating liquors on a particular occasion does not have the effect to render a person incompetent to execute a will, unless operative at the time of making it, but the evidence that he was addicted to the habitual use

77—*Ravenscroft v. Stull*, 280 Ill. 406. Citing: *Rowcliffe v. Belson*, 261 Ill. 566; *Coleman v. Marshall*, 263 Ill. 330.

78—*Austin v. Austin*, 260 Ill. 299; *England v. Fawbush*, 204 Ill. 389.

79—*Snell v. Weldon*, 239 Ill. 279.

80—*Dickerhoof v. Wood*, 267 Ill. 50.

of intoxicating liquors is competent, for the reason that, as a matter of common knowledge, such use would impair the faculties of body and mind.⁸¹

The rule deducible from the cases on this subject is, that while the declarations of the testator are not admissible to show an express revocation of the will, or the fact that it was executed under duress, or from undue influence, they may nevertheless be proved and used to show his mental condition at the time of the execution of the will, or so near the time the same state of affairs must have existed.⁸²

A statement or admission made by a devisee concerning the testamentary capacity of the testator or acts of undue influence in procuring the execution of the will, while admissible in evidence where the interest of all the devisees are joint, are not admissible where the interest of the devisees are separate. And where the interest of the devisees is severable it is error to admit the testimony even though it is confined to the interest of the party making the statement. It is incompetent as to the other devisees and as it could not affect the issue without affecting the other defendants it was incompetent to go to the jury on the issue involved. Where the devisees do not have a joint interest under the will but have a separate interest in one subject,—the validity of the will,—it is incompetent. If a judgment could be rendered against one defendant without affecting the interest of the others there might be some ground for admitting the evidence of declarations as against the defendant who made them. But the only question is as to the validity of the will, and the testimony which defeats one defendant—one devisee—defeats all and a judgment against one necessarily defeats all.⁸³

The law allows the jury to consider, on the question of

81—*Ravenscroft v. Stull*, 280 Ill. 406.

82—*Reynolds v. Adams*, 90 Ill. 134.

83—*McCune v. Reynolds*, 288 Ill. 188.

mental capacity, whether the will was reasonable or unreasonable.⁸⁴

§ 1857. Objects of Testator's Bounty—A person in making a will has the absolute right to make it in such a manner as he may see fit. He has the right to prefer one child or object of his bounty over another or to make an inequitable division of his property, as he may see fit. He has the right to do so without assigning any cause or without any cause being shown therefor. So if the testator at the time of making his will had sufficient mind and memory to know, understand and appreciate the object of his bounty and the way and manner in which he wished to dispose of his property by a testamentary disposition in his will and that he knew the nature and amount of his property, he had the legal right to make such disposition as he might see fit.⁸⁵

Children and grandchildren have no interest in the property of the ancestor; in making no provision for them in his will he deprives them of nothing, and it is immaterial whether the disposition made be regarded as reasonable or unreasonable, or just or unjust, so long as it is the will of the testator. Where neither fraud or undue influence is shown, the court cannot declare a will void merely because the testator bestowed his property upon a stranger or relative by marriage in preference to those to whom he is bound by ties of blood, natural affection or moral duty.⁸⁶

§ 1858. Undue Influence and Fiduciary Relations—These two subjects are so intimately connected that it is difficult to separate them and they will be considered together. Undue influence is that influence which is obtained either by flattery, importunity or threats, or in some other mode by which a dominion is acquired over the will of the testator, destroying his free agency and constraining him to do, against his free will, what he is unable to refuse.⁸⁷

84—Rowcliffe v. Belson, 261 Ill. 50; Brainard v. Brainard, 259 Ill. 566. 613.

85—Grace v. Grace, 270 Ill. 558.

87—2 Greenleaf on Evidence, § 688,

86—Dickenhooft v. Wood, 267 Ill. and Note 1.

In the case of *Roe v. Taylor* it was said in substance on this point (undue influence) the authorities most entitled to favorable consideration give the rule as announced in the instructions asked and the court was of the opinion that the court erred in refusing them. The rule is, that the influence exercised must be of such a nature as to deprive the testator of his free agency.—*Redfield on Wills*, 522.

There it is said: "It may be safe to adopt the language of Chief Justice Clayton, in *Chandler v. Ferris*, 1 Harrington (Del.) 454, 464, that neither advice nor argument nor persuasion would vitiate a will made freely and from conviction, though such will might not have been made but for such advice and persuasion." Reference is made to the cases *Calvert v. Davis*, 5 Gill & J. 301; *Martin v. Tague*, 2 Spear (S. C.) 268; *O'Neal v. Rarr*, 1 Rich. (S. C.) 80. This learned author, in summing up, says: "It is obvious, from the cases cited, that the influence to avoid a will must be such as to destroy the freedom of the testator's will, and thus render his act obviously more the offspring of the will of others than of his own; that it must be an influence specially directed toward the object of procuring a will in favor of particular parties; and if any degree of free agency or capacity remains in the testator, so that, left to himself, he was capable of making a valid will, then the influence which so controlled him as to render the making of a will of no effect must be such as was intended to mislead him in the matter of making a will essentially contrary to his duty, and it must be proved successful to some extent, certainly." ⁸⁸

Undue influence has been defined to be "any improper or wrongful conduct, machination, or urgency of persuasion, whereby the will of a person is overpowered, and he is influenced to do or forbear an act which he would not do, or would do if left to act freely." ⁸⁹

⁸⁸—*Roe v. Taylor*, 45 Ill. 485;
Allmon v. Pigg, 82 Ill. 149.

⁸⁹—*Smith v. Henline*, 174 Ill. 184.

It must be an influence specifically directed toward procuring a will in favor of a particular person.⁹⁰

What constitutes undue influence depends upon the circumstances of each case. All influences are not unlawful. The doctrine of equity, however, concerning undue influence is broad, and it will reach every case and grant relief where influence is acquired and abused and confidence is reposed and betrayed.⁹¹

If the provisions of a will, executed by a feeble old man, differ from his previously expressed intentions and differ in favor of those who stood in confidential relations to him, it is evidence of fraud and undue influence, which must be overcome by the most satisfactory proof.⁹²

The rule is, where a person of enfeebled mind by disease or age is so placed as to be likely to be subject to the influence of another and makes a voluntary disposition of his property in favor of that person, the court requires proof of the fact that the donor understood the nature of the act and that it was not done through the influence of the donee.⁹³

Many authorities mention, as features unfavorable to the validity of a will, and as indicating the probable exercise of undue influence, such concurring circumstances as the following: the departure from the terms of a previous testamentary disposition; the false impression under which the instrument is made; the active agency of the beneficiary in procuring it to be drawn; the absence of those who had at least equal claims upon the justice of the testator; old age accompanied by feebleness and disease. (Citing a number of cases.)

Where a will is procured to be written by persons largely

90—McCune v. Reynolds, 288 Ill. 188.

91—Leonard v. Burtle, 226 Ill. 422.

92—From brief of appellant, in Reynolds v. Adams, 90 Ill. 134. In support of which he cites Lee v. Dill,

II Abb. Pr. 214; Boyd v. Boyd, 66 Pa. St. 283; Walker v. Hunter, 17 Geo. 364; Small v. Small, 4 Me. 192.

93—Berry v. Egan, 291 Ill. 377. Citing: Dowie v. Driscoll, 203 Ill. 480.

benefited by its provisions it is a circumstance to excite a stricter scrutiny and require stricter proof of volition and capacity. (Citing a number of authorities.)⁹⁴

The court instructed the jury that, where undue influence is alleged, the real inquiry is this: Did the testator make and execute the alleged will, in all its provisions, of his own free will and volition, so that it now expresses his own wishes and intentions; or was the testator constrained or induced through undue influence, restraint, coercion or improper conduct of others, to act contrary to his own desires and intentions, as regards the disposition of his property or any part of it.⁹⁵

It is, however, not enough to show the existence of confidential relations and undue influence. It must also be shown that the undue influence was operative on the mind of the testator at the time the will was executed and the execution of the will was the result of such undue influence, and not the free will of the testator. Undue influence may be established by circumstantial evidence, but the evidence must be such as to show that the influence was operative at the time of the transaction sought to be impeached. (Citing a number of authorities.) Advice, arguments or persuasion will not vitiate a will made freely and from conviction, though such a will would not have been made but for such advice. Undue influence which will have the effect to avoid a will must be such as to destroy the freedom of the testator's will and make his act more the offspring of another's will than his own. It is not enough that the circumstances attending the execution of the will are consistent with the exercise of undue influence. They must be inconsistent with the absence of such influence.⁹⁶

While it is true that the undue influence that will invalidate a will must be present and exercised over the mind

94—*Smith v. Henline*, 174 Ill. 184.

96—*Waterman v. Hall*, 291 Ill.

95—*England v. Fawbush*, 204 Ill. 304.

of the testator at the time the will is made, yet it is competent to prove the previous conduct of one charged with procuring it to be made, as tending to show his influence over the testator at such time.^{96a}

The undue influence which will avoid the will must be connected directly with the execution of the instrument and be operating when the will is made. (*Wickes v. Walden*, 228 Ill. 56.)

It must be influence specially directed toward procuring the will in favor of a particular person, and be such as to destroy the freedom of the testator's will and render the instrument obviously more the offspring of the will of others than of his own.⁹⁷

But the inquiry whether undue influence was executed over the mind of the testator should not be confined to the execution of the will. It should be whether undue influences operated upon him in the disposition of his property.⁹⁸

While it is true that the undue influence which will invalidate a will must be present and exercised over the mind of the testator at the time the will is made, yet it is competent to prove previous conduct of the one charged with procuring it to be made, as tending to show his influence over the testator at such time.

It has been held that advanced age and loss of memory do not of themselves indicate a want of capacity to dispose of property, but a testator is more liable to be unduly influenced when his mind has become impaired by serious illness, and that undue influence, which will justify the setting aside of a will, must be such as will deprive the testator of his free agency.

96a—*Wilbur v. Wilbur*, 138 Ill. 446.

97—*Snell v. Weldon*, 239 Ill. 279.

98—From appellant's brief in *Reynolds v. Adams*, 90 Ill. 134. In support of which he cites *Taylor v.*

Wilbaum, 20 Mo. 306; *White v. Bailey*, 10 Mich. 155; *Beaubien v. Cicatte*, 12 Mich. 486; *Willitts v. Porter*, 42 Ind. 250; *Roberts v. Trawick*, 17 Ala. 455.

It has been held that while inequality in the distribution of property is not of itself conclusive evidence of undue influence, yet it may be considered as a circumstance, tending to establish undue influence, in connection with all the other facts and circumstances in the case. (Citing a large number of authorities.)⁹⁹

Influence secured through affection is not undue influence which will invalidate a deed.¹

Where a will is made in favor of a child at his solicitation and because of partiality influenced by affection for him it will not be undue influence.²

Influence secured through kindness, care, solicitude or flattery is not wrongful and does not constitute undue influence as that term is used in the law of wills.³

No presumption that a will was made by a parent in favor of a child was procured by the child's undue influence arises from the relation, in the absence of evidence that a confidence was, in fact, reposed in the child.⁴

There is a well defined distinction between undue influence arising from acts which the law deems fraudulent, and undue influence arising from fiduciary relation between the parties. The term fiduciary or confidential relation as used in this connection is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused, and in which confidence has been reposed and abused. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, does the relation in fact exist? Unless the party claiming the benefit of the contract show by clear and convincing

99—*England v. Fawbush*, 204 Ill. 389.

1—*Udsteuen v. Illk*, 291 Ill. 443.

2—*Hurd v. Reed*, 260 Ill. 154.

3—*Dickerhoof v. Wood*, 267 Ill. 50.

4—*Huffman v. Graves*, 245 Ill. 440.

proof, that he acted with perfect good faith and did not abuse or betray the confidence reposed in him the presumption of fraud will require strong evidence to remove it.⁵

Any relation existing between the parties to a transaction wherein one of the parties is in duty bound to act in the utmost good faith for the benefit of the other is a confidential or fiduciary relation. Such a relation arises whenever a continuous trust is reposed in one person in the skill or integrity of another.⁶

Proof of the fiduciary relations existing between the testator and the principal beneficiary under the will, with the fact that he procured his attorney to prepare the will, that the beneficiary and his attorney were alone with the testator for the space of two hours when the will was drawn, and the fact that the appellant was practically the only beneficiary of a considerable estate, establishes *prima facie* the charge of undue influence.⁷

Where a beneficiary in a will has been for several years in the custody and care of the personal estate of the testator and the leasing and management of his real estate, and while the testator was dangerously sick, after a short interview goes away and prepares the will, arranges for the attendance of witnesses whom he selected and supervised its execution, such facts tend to show a fiduciary relation existing between the beneficiary and the testator which brings the case within the rule that where there is such a confidential relation and the person in whom such confidence is reposed prepares the will, or procures its preparation, and he profits thereby, the facts, standing alone and undisputed, sustain the charge that the will was procured by the undue influence of the beneficiary.⁸

Where a fiduciary relation exists between parties to a transaction the party claiming the benefit thereof has the

5—*Mayrand v. Mayrand*, 194 Ill. 45. Citing: *Thomas v. Whitney*, 168 Ill. 225.

6—*Abbott v. Church*, 288 Ill. 91.

7—*Leonard v. Burtle*, 226 Ill. 422.

8—*Snyder v. Steele*, 287 Ill. 159. Citing: *Gum v. Reep*, 275 Ill. 503; *Yess v. Yess*, 255 Ill. 414.

burden of showing that the dealing was fair and at arm's length.⁹

Where a fiduciary relation exists between the testator and a devisee who receives a substantial benefit from the will and where the testator is the dependent and the devisee the dominant party and the testator therefore reposes trust and confidence in the devisee as in the ordinary relation of attorney and client, and where the will is written, or its preparation procured, by that beneficiary, proof of the facts establishes *prima facie* the charge that the execution of the will was the result of undue influence exercised by that beneficiary, and this proof standing alone and undisputed by other proof entitles the contestant to a verdict. (Citing a large number of authorities.)

This results from the distinction between undue influence arising from coercion or active fraud and undue influence resulting from the abuse of a fiduciary relation existing between the parties. Proof of the relationship and the fact that the beneficiary, in whom trust and confidence was reposed by the testator, prepared or procured the preparation of the will, may or may not be a preponderance of all the evidence on that subject. When the proof is made, the presumption arises therefrom that undue influence induced the execution of the instrument. That proof cast upon the proponent, if he is to sustain the will, the necessity of showing that the execution of the will was the result of free deliberation on the part of the testator and of the deliberate exercise of his judgment, and not the imposition or wrong practiced by the trusted beneficiary.¹⁰

The existence of a fiduciary relation does not avoid a contract unless by reason of the relation undue advantage is taken of the party.¹¹

Although there may exist a fiduciary relation between a father and son the execution of deeds by the father to the

9—*Oliver v. Ross*, 289 Ill. 624.

11—*Lang v. Lang*, 284 Ill. 148.

10—*Weaton v. Teufel*, 213 Ill. 291.

son under certain circumstances will be held to be valid if it appears it was entered into with full knowledge of the nature and effect of the deeds and resulted from the deliberate, voluntary and intelligent desire of both and not through influence engendered by their relation.¹²

§ 1859. Burden of Proof of Undue Influence—The burden rests upon the contestant to prove the charge of undue influence. This cannot be done by establishing, alone, a fiduciary relation existing between the testator and the beneficiary. The mere fact that a beneficiary stands in a fiduciary relation to the testator does not put upon the beneficiaries the burden of showing an absence of fraud and undue influence, where there is evidence tending to show that they were in any way instrumental in procuring the execution of the will.¹³

Proof of undue influence may be wholly circumstantial and inferential, and the influence may be that of a third person as well as that of direct beneficiaries; and such undue influence would invalidate the will.¹⁴

But undue influence is a species of constructive fraud which the court will not undertake to define by any fixed words. Its exercise may be inferred in all cases where the power of the person, receiving a devise or other like benefit, has been so exercised upon the mind of the donor, as, by improper arts and circumvention, to have induced him to make the devise, or confer the benefit contrary to his deliberate judgment and reason. It is immaterial by whom the undue influence is exercised, whether by the beneficiary or an outsider.¹⁵

It is not sufficient to avoid a will or deed that its execution was procured by honest argument, untainted by fraud. Proper and legitimate influence, honestly acquired,

12—Valbert v. Valbert, 282 Ill. 415.

13—McCune v. Reynolds, 288 Ill. 188.

14—Cheney v. Goldy, 225 Ill. 394.

15—Smith v. Henline, 174 Ill. 184.

is not the exercise of undue influence. Such influence must be executed and operate at the time of the transaction sought to be impeached. Something more than suspicion is required to prove the allegation of fraud. The evidence must be clear and cogent and must leave the mind well satisfied that the allegation is true.¹⁶

In the celebrated Snell case it was said: "Although there was no evidence of undue influence, the verdict of the jury as to the two codicils was undoubtedly based upon evidence improperly admitted. After the death of the testator the appellee took from the testator's trunk letters from Mabelle Snell which the court admitted in evidence. The language used in these letters was filthy beyond comparison and they contained the coarsest and most obscene words known to the vocabulary. They indicated the existence of meretricious relations between the writer and the testator, and the jury would naturally infer from their contents the existence of such relations. It scarcely need be said that the letters were no evidence of such relations, or of the existence of any fact, and if they had been, they would still have been incompetent. The existence of improper relations with a legatee would be no reason whatever for setting aside the will and would not of themselves establish undue influence. The silence of the testator and retaining the letters in his trunk, did not necessarily imply assent to what they contained. Where there is proof that due influence has been exercised by some person upon a testator, the existence of unlawful relations with that person may be considered for the purpose of determining whether the influence was effective or undue but not otherwise." ¹⁷

§ 1860. Practice in Suits Contesting Wills—It is incumbent upon the proponents of a will to make out a prima

16—Valbert v. Valbert, 282 Ill. 415. Citing a large number of authorities.

17—Snell v. Weldon, 239 Ill. 279.

facie case, in the first instance, by proper proof of the due execution of the will by the testator and his mental capacity, as required by the statute; and, consequently, that he has the right to open and conclude the case; and it is held that such a party is bound to prove affirmatively, that the contested paper is the last will and testament of the testator.¹⁸

Thereupon the burden of proof is shifted to the contestant to prove the allegations of the bill, by a preponderance of the evidence.¹⁹

In a system of practice where the common law and equity courts were entirely separate and their jurisdiction exercised by different judges, an issue of fact to be tried at law is certified by the chancery court to the common law court, and after the trial the verdict was certified by the common law court back to the chancery court. Under our system the same judge exercises both common law and chancery jurisdiction in the same court at the same time, and he may make the issue at law and immediately call a jury to try it. This practice has made it unnecessary in our courts to follow some of the rules which prevailed under the system of separate courts of chancery and common law jurisdiction, and in the practice some of such rules are disregarded. The usual method of submitting an issue of fact to be tried by a jury in cases of this character is in the form of questions made up by the court, or by the parties under the direction of the court, framed so as to require merely an affirmative or negative answer. Where the record fails to show that such a practice was followed in a particular case if the recitals in the decree is to the effect that it was done and that the issue was submitted to a jury, and the verdict so returned by the jury upon that issue, such recitals must be taken as showing that it was done. And where there are no objections made in the trial court as to the manner in which the questions were sub-

18—*Rigg v. Wilton*, 13 Ill. 15.

19—*Baker v. Baker*, 202 Ill. 595.

mitted, any objections in regard thereto must be regarded as waived.²⁰

After the contestants had given evidence of the conduct of the testator and his charges concerning his wife and the children the defendants produced expert witnesses to whom hypothetical questions were put embracing such facts, for the purpose of getting the opinion of experts before the jury that in their opinion such facts were not evidence of insane delusions. The court sustained objections thereto on the ground that the evidence should have been offered by the proponents in making out their case. The error in the ruling is apparent from the fact that the proponents of the will could not have known what would be testified to by the contestants' witnesses till their evidence had been given. It is proper for the proponent of the will to offer all his evidence of testamentary capacity in the first instance, and if he desires to present to the jury the opinions of experts based upon hypothetical facts testified to by his witnesses he should do so before closing in chief; but after the contestant has offered his evidence the proponent has the right to examine expert witnesses as to what conclusions, in their opinion, should be drawn from such evidence.²¹

Where the testator signs his will by a mark, and the evidence shows that it was dictated by a third person, it is not necessary for the proponent to prove that the contents were read to the testator. If the will is found with his signature to it, the presumption is that he did not sign it without knowing its contents. Such is the usual presumption in reference to all instruments and there is no distinction between persons who can and who cannot read or write. Where it is shown as a matter of fact that the will was not read to the testator and that he was ignorant of its contents, and that he was in such a situation as to be readily imposed upon, or was in fact imposed upon by

20—*Lewark v. Dodd*, 288 Ill. 80.

21—*Albrecht v. Hittle*, 248 Ill. 72.

designing persons, such evidence would be sufficient to avoid the will.²²

§ 1861. Conflicting Statements of Testator—Declarations at different periods of life as to the views and intentions of the testator in the disposition of his property may be introduced if consistent with the provisions of the will, but are not competent to be considered to invalidate a will as having been made under undue influence. (Citing *Compher v. Browning*, 219 Ill. 429.)²³

The court recognizes fully the doctrine, frequently announced and insisted upon by counsel, that statements made by the testator either before or after the execution of a contested will, which are in conflict with the provisions thereof, do not invalidate or modify such will in any manner, and that parties, making wills, cannot invalidate or modify such will in any manner, by their parol declarations made previously or subsequently.²⁴

§ 1862. Quantity of Evidence in Will Contests—As to all questions affecting the validity of a will, such, for example, as the sanity or capacity of the testator, no particular quantum of evidence is necessary on the trial of an issue under the statute. The jury are to hear the proofs submitted by the parties, and decide the issue as they would any other question of fact, according to the weight of the evidence. Nor is it essential that the proof should be made by particular witnesses.²⁵

It is only after evidence has been received which tends to prove unsoundness of mind that the will itself may be considered by the jury, and then it must be considered in connection with such evidence. The only purpose in considering the will is to assist in determining whether the testator was of sound mind and memory at the time of its execution.²⁶

22—*Doran v. Mullen*, 78 Ill. 342.

25—*Rigg v. Wilton*, 13 Ill. 15.

23—*Cheney v. Goldy*, 225 Ill. 394.

26—*Brainard v. Brainard*, 259 Ill.

24—*England v. Fawbush*, 204 Ill. 613.

§ 1863. Impeaching Attesting Witness—The well known general rule that a party who produces a witness vouches for his integrity and credibility, and cannot be allowed to impeach and discredit them, has not full application where the law requires the party shall produce such witness in the cause. As to witnesses whom the party is required by law to produce, the rule is that the truthfulness and integrity of the witness is not vouched for, and the party so producing the witness may bring forward proof of previous declarations at variance on material points with his testimony for the purpose of impeaching him or contradicting his testimony on such points.²⁷

§ 1864. Rule as to Non-Expert Witnesses—When the case of *Roe v. Taylor*, 45 Ill. 485, was decided it was said that there was much conflict on the question whether witnesses not experts could give an opinion of the soundness of mind of the testator, and it was there held, and the rule has since been followed, that a witness who has detailed the facts on which an opinion is based may give his opinion, to be valued by the jury according to the intelligence of the witness, and his capacity to form an opinion, and that latitude should be allowed on cross examination. A witness may state facts and circumstances from which a jury would form an opinion and the law then permits the witness to give the impression which such facts and circumstances made on his mind, to be taken by the jury for what it is worth.²⁸

§ 1865. Instructions—Withdrawing Case from Jury—It is not within the province of a judge on a motion to withdraw a case from the jury, to weigh the evidence and ascertain where the preponderance is. This function is limited strictly to determining whether there is or is not evidence legally tending to prove the fact affirmed,—*i. e.*, evidence from which, if credited, it may reasonably be inferred, in legal

²⁷—*Thompson v. Owen*, 174 Ill. 229.

²⁸—*Snell v. Weldon*, 239 Ill. 279.

contemplation, the fact affirmed exists, laying entirely out of view the effect of all modifying or countervailing evidence. Where the evidence given to the jury, with all the inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if rendered, must be set aside, the court is not bound to submit the case to the jury but may direct a verdict for the defendant.

But the real question in every such case is not whether a new trial will have to be granted or not, but whether there is any evidence on the part of the plaintiff or defendant tending to prove each and every material allegation of the declaration or plea. It has always been held that the question whether the trial court properly instructed the jury to find for the plaintiff or defendant is one of law, reviewable by this court, and this manifestly could not be true if the ruling of the trial court in any sense depended upon its determination of the weight of the evidence. We have nothing to do with any question as to the preponderance of the evidence, or the creditability of witnesses, or the force to be given to the evidence having a tendency merely to impeach the credibility of the witness. The only question is whether any evidence was given which, if true, would tend to support a verdict.²⁹

At the close of the evidence the appellant moved the court to instruct the jury that there was no evidence of undue influence and they should not consider that question in making up their verdict. The court refused to give the instruction tendered and the appellant excepted. Where there is no evidence to support a charge of undue influence that question should be taken from the jury by the court.³⁰

§ 1866. Verdict of Jury in Contested Wills—In contested will cases arising under our statute the verdict of the jury

29—Woodman v. Illinois Trust & Savings Bank, 211 Ill. 578; Cheney v. Goldey, 225 Ill. 394.

30—Snell v. Weldon, 239 Ill. 279.

is given the same force and effect as a verdict in a case at law under a like state of facts. And if such verdict is not manifestly against the weight of the evidence the court is bound by it in the same manner and to the same extent as in a case at law.³¹

§ 1867. Limitation of Actions—While courts of equity usually follow the law in applying the statutes of limitation, and especially in cases where courts of law and equity have concurrent jurisdiction, but where the jurisdiction of courts of equity is exclusive, it is not bound by the limitations applicable to actions at law, but may restrict or enlarge them according to the particular circumstances of the particular case. The fact that the statute is positive in its terms will not, under all circumstances, operate as a bar in equity. There are cases in which a court of equity will not permit the bar of the statute to interfere against conscience, and it will supply and administer a remedy within its jurisdiction and enforce the right for the prevention of fraud.³²

§ 1868. Right of Minor or Non-Compos to File Bill by Next Friend—In a certain case the question of law submitted to the court was whether a minor by his next friend could during the period of his minority exhibit a bill to contest the validity of a will, or must he wait till he attains his majority, and then within one year therefrom so exhibit the bill. In response to this question it is said that if a person within the saving clause may perform the act within a given time after the disability ceases, no reason is perceived why he may not, by those who can legally act for him, during its continuation. In fact, it would operate unjustly, to hold that such a person could not sue and recover his property until after the disability terminated. It would in many cases operate as a deprivation of the party owning the property of its use and en-

31—Kellan v. Kellan, 258 Ill. 256;
Louby v. Key, 258 Ill. 558.

32—Evans v. Moore, 247 Ill. 60.

joyment during his life. Considering the language used in section 7 of the Statute of Wills, and the subject and purpose of the enactment, it cannot be attributed to the legislature an intent to provide that if a minor, or some one in his behalf, did not file a bill to contest a will within one year after its admission to probate, he should be precluded from contesting the will until he attained his majority.³³

§ 1869. Will Void as to One Contestant Not Void as to Non-Contestants—A minor heir of a deceased person, by his next friend, filed a bill to contest the will of the deceased after the expiration of one year after the probate of the will; there was another minor heir and also an adult heir who did not join in the will contest. The question presented to the court was, whether the proviso in section 7 of the Statute of Wills, as to contesting wills, gave the court a right to set the will aside entirely at the suit of one within the saving clause after the year had passed so as to wholly destroy the interest of all the beneficiaries named in the instrument, or only to set it aside as it affected the interest of the heir who was an infant or *non compos mentis* at the time the will was probated, and who filed such a contest before the expiration of one year after becoming of age or becoming insane as the case may be. The holding of the trial court was that the court had the power to set aside the will, absolutely as to all the beneficiaries. On this point the Supreme Court says: "It is urged with earnestness by counsel for appellee that it is unreasonable to construe the statute so that a will can be valid as to certain of the heirs or parties and invalid as to others; that the will should be annulled in its entirety or not at all. We see no difficulty, however, in voiding the probate so far as concerns the interest of the contesting heirs then or formerly under disability and permitting it to stand so far as it concerns the heirs who have lost their rights by lapse of time. It is purely a question as to what the legislature

33—Cohen v. Cohen, 287 Ill. 269.

intended. One of the great objects of the law is to quiet the title to property and render it certain. If section 7 is to be construed as contended for by counsel for the appellants, there would be a chance that twenty years or more after a will was probated the whole title under which the beneficiaries claimed might be overthrown and the property given to the heirs. This would render it very difficult, if not impossible, to dispose of the property or improve it to any considerable extent during all that time. It is the policy of the law to limit uncertainties, such as the one under consideration, as much as is commensurate with other rights which the law cannot overlook. It is clear that the policy of the law has been for many years in this country, and especially in this State since 1829, to limit the time in which will contest could be brought. It would be absolutely contrary to the trend of public policy in this regard to construe the statute as holding the rights of beneficiaries, not only with respect to those heirs who are under disability but also with respect to those under no disability, shall remain unsettled until such time as the disability of all the heirs are removed. In our judgment a fair construction of the statute, in the light of the history of legislation upon this subject, is that after the year the probate is, as the proviso says, forever binding and conclusive on all the parties concerned, except infants and persons *non compos mentis*. The circuit court erred in holding otherwise." ³⁴

§ 1870. Death of Interested Person Within One Year—Statute—"Provided, Further, That if any person interested in such will, testament or codicil, within the meaning of this act, shall die within one year after the probate of such will, testament or codicil, then, and in such case, the right to contest such will, testament or codicil and the cause of action thereof shall survive and descend to the heir, legatee, devisee, executor, administrator, grantee or assignee of such deceased interested person." ³⁵

34—*Lawark v. Dodd*, 288 Ill. 80.

35—*Laws*, 1919, P. 992.

§ 1871. Death of Complainant in Contesting Suit—Statute—“And Provided, Further, That in case any person interested in any will, testament or codicil shall begin a suit to contest any such will, testament or codicil, and shall die before the final determination of such suit or contest, the cause of action, suit or contest shall not on that account abate, but such suit, cause of action or contest shall survive and descend to the heir, legatee, devisee, executor, administrator, grantee or assignee of such deceased interested person; and the death of such interested person may be suggested on the record and such heir, legatee, devisee, executor, administrator, grantee or assignee of such deceased interested person, may be substituted as complainant, plaintiff, petitioner or as defendant in such suit, contest or action, and the cause of action, suit or contest proceed as though such substituted parties had been originally joined as complainants, plaintiffs, petitioners or defendants as the case may be. And in all such trials by jury as aforesaid the oath of the subscribing witnesses taken, reduced to writing and filed in court at the time of the first probate, properly certified to, shall be admitted as evidence and have such weight as the jury shall think it may deserve.”³⁶

§ 1872. Revoking Wills—Statute—“No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law.”³⁷

The statute provides that no will or codicil shall be revoked otherwise than by burning, tearing or obliterating the same by the testator himself, or by some one in his

36—Laws, 1919, p. 992.

37—Sec. 17, Chap. 148, R. S.

presence and by his direction and consent, or by some other will or codicil duly executed. The rule is laid down by the authorities that the mere intention to revoke a will, unaccompanied by any act of the testator to execute that intention, will not be sufficient to revoke a will, even though the intention was frustrated by the fraud or improper conduct of other persons. Slight acts of tearing, burning or canceling, with the purpose and intention of revoking a will, may be sufficient for that purpose, but the intention to revoke unaccompanied by any of the acts of destruction required by the statute, is insufficient.³⁸

It is the animus which must govern the extent and measure of operation to be attributed to the act and determine whether the act shall effect the revocation of the whole instrument.³⁹

Perhaps, in no branch of the law is there more conflict among the decisions of the courts than in that which relates to the revocation of a former will by a subsequent will, and the effect of the cancellation of a subsequent revoking will in reference to the revival or non-revival thereby of the first will. Many of the cases, which hold that the loss or destruction by the testator himself of a subsequent will, containing a revoking clause, does not revive a former will, though found in the possession of the testator uncanceled at his death, are based upon statutes dissimilar to the Illinois statute upon this subject and upon considerations which have no force or application to this State under the decisions of the court. By the terms of section 17 of the statute, the subsequent will which shall have the effect of revoking a former will, must be a will "declaring the same"; that is to say, must be a will which, upon its face and by its terms, declares a revocation. So it is well established in this State a former will can only be revoked by a subsequent will, and not by a subsequent

38—Bohleber v. Rebstock, 255 Ill. 53. 39—Burton v. Wylde, 261 Ill. 397.

instrument in writing not of a testamentary character which declares the revocation of a former will. And it cannot be said that, in this State the destruction of a duly executed will containing an express revocation of a former will does not have the effect of reviving the former will, provided it is retained and preserved by the testator.⁴⁰

Where a codicil is appended to a will and does not contain any clause or revocation, the provisions of the will are to be disturbed only as so far as is absolutely necessary to give effect to the provisions of the codicil, and in other respects the will and codicil are to be construed together.⁴¹

A strong effort will be made to construe a codicil so as to reconcile it with the will as far as possible, and the codicil will be held to revoke the will only when necessary to give effect to the provisions of the codicil.⁴²

It seems to be the rule that where the destruction of a will is connected with the execution of another instrument so as to raise the inference that the testator meant the revocation of his will to depend upon the efficacy of the new instrument as a disposition of his property, if the latter instrument proves to be inoperative from any cause the revocation fails.⁴³

§ 1873. Marriage Revokes Will—A marriage of the testator subsequent to the making of his will operates as a revocation thereof.⁴⁴

§ 1874. Wills to Remain with the Clerk of the County Court—Statute—“All original wills, together with the probate thereof, shall remain in the office of the clerk of the county court of the proper county; and copies of the record of the same, and copies of the record of exemplifications

40—*Stetson v. Stetson*, 200 Ill. 601; *Moore v. Rowlett*, 269 Ill. 88.

41—*Meckel v. Johnson*, 231 Ill. 540.

42—*McKinstry v. Price*, 263 Ill. 626.

43—*Griffith v. Higinbotom*, 262 Ill. 126.

44—*Peoria Humane Society v. McMurtrie*, 229 Ill. 519.

of foreign wills recorded in said office as in this act provided, duly certified under the hand of the clerk and seal of said court, shall be evidence in any court of law or equity in this state.”⁴⁵

§ 1875. Debtor of Testator as Executor—Statute—“In no case hereafter, within this state, where any testator or testatrix shall by his or her will, appoint his or her debtor to be his or her executor or executrix, shall such appointment operate as a release or extinguishment of any debt due from such executor or executrix to such testator or testatrix, unless the testator or testatrix shall, in such will, expressly declare his intention to devise, bequeath or release such debt; nor even in that case, unless the estate of such testator or testatrix is sufficient to discharge the whole of his or her just debts, over and above the debt due from such executor or executrix.”⁴⁶

§ 1876. Contract to Make Will—An agreement to make a will in a particular manner will be enforced in equity after the promissor’s death, as against heirs, devisees, and persons representative of deceased persons, where the agreement is established by clear proof and the consideration therefor is sufficient.⁴⁷

Equity will not grant a specific performance of a contract to make a will in a particular manner, if the contract is uncertain, inequitable or unjust, in the alternative and not founded on a fair consideration.⁴⁸

A contract to make a will in a particular manner need not be in writing to be enforceable as against the statute of frauds where all the estate of the promissor when the agreement was made, and at the death of the promissor was in personal property.⁴⁹

An agreement to make a will is manifested in writing where the consideration therefor consists of a written or-

45—Sec. 18, Chap. 148, R. S.

46—Sec. 19, Chap. 148, R. S.

47—Whiton v. Whiton, 179 Ill. 32.

48—Barrett v. Geisinger, 179 Ill.

240.

49—Whiton v. Whiton, 179 Ill. 32.

der for the payment of money, signed by the promisees and delivered to the promissor, who in return executed a will in accordance with the agreement and delivered the same to her trustee, although she afterwards obtained possession of the will and destroyed it.⁵⁰

A gift of property must be regarded as testamentary in character, though not in form, where its purpose is to defraud parties to whom the donor had previously willed the property in accordance with an agreement based on a sufficient consideration.⁵¹

The general rule is, that before specific performance of a contract will be decreed it must appear that there was mutuality, both in obligation and remedy, under the contract, as long as the contract remains executory on both sides. (Citing a number of authorities.) But this rule has no application to contracts in which the provisions which cannot be enforced have been fully performed. Contracts for personal care and attention or personal service usually cannot be enforced specifically. However, where personal care and attention or personal service have been fully performed and the circumstances are such that to deny specific performance would leave the party with an injury that could not be adequately compensated in damages, equity will grant a specific performance of the remaining provisions of the contract.⁵²

Where an owner of property writes to his nephew in Wales requesting him to come to America and take care of such owner and his property, and as an inducement for the nephew to do so promises to will him all his property, and the nephew complies with such request, but the owner instead of making a will as promised makes a will leaving all his property to a third party, with the understanding though not expressed in writing, that such third party shall hold the property in trust for the nephew, such third

50—Whiton v. Whiton, 179 Ill. 32;
Oswald v. Nehls, 233 Ill. 438.

51—Whiton v. Whiton, 179 Ill. 32.
52—Oswald v. Nehls, 233 Ill. 438.

party takes the title as trustee for the nephew, whether he knew of the agreement between the uncle and nephew or not, as he took the property without any consideration, and subject to the performance of the contract between the uncle and nephew.

“Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, expressed or by operation of law, is conveyed or transferred by the trustee, not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person, who is a mere volunteer, or is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. Equity imposes the trust upon the property in the hands of the transferee or purchaser, compels him to perform the trust if it be active and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive fraud or should actually intend a violation of the trust obligation. It is sufficient that he acquires property upon which a trust is, in fact, imposed, and that he is not a bona fide purchaser for a valuable consideration and without notice. This universal rule forms the protection and safeguard of the rights of the beneficiary in all kinds of trusts.

“It enables them to follow the trust property,—lands, chattels, funds or securities, and even money,—as long as it can be identified, into the hands of all subsequent holders, who are not in the position of bona fide purchasers for value and without notice. It furnishes all those distinctively equitable remedies which are so much more effective

in securing the beneficiary's rights than mere pecuniary recoveries at law." (Pomeroy's Eq. Jur., § 1048.)⁵³

§ 1877. Compensation to Trustees in Wills—Statute—
"That where a trustee or trustees shall hereafter act under any power or appointment given or created by any will, testament or codicil, and in such will, testament or codicil, except in case of trusts for charitable, religious or educational purposes, shall be contained no provision respecting the compensation to be allowed or paid such trustee or trustees, a reasonable compensation may be charged and allowed, demanded and collected therefor. The exception in this act in regard to trusts for charitable, religious or educational purposes is intended to apply only to trustees 'of charitable, religious or educational institutions,' and not to trustees created by will, testament or codicil. The county court of the county in which the will was admitted to probate or the circuit court of such county, in case such court shall take jurisdiction of a trust estate, may allow a reasonable fee to such trustee or trustees so created by will, testament or codicil where the compensation is not expressly forbidden by the terms of the will, testament or codicil.'" ⁵⁴

53—*Evans v. Moore*, 247 Ill. 60.

54—*Laws*, 1913, p. 1.

CHAPTER XVIII

INJURIES TO PRIVATE PROPERTY BY PUBLIC IMPROVEMENTS

- § 1880. Introduction.
- § 1881. Constitutional Provisions in Regard to Taking or Damaging Private Property for Public Use.
- § 1882. Property Defined.
- § 1883. General Rule Applicable to the Recovery of Damages to Private Property by Public Improvements.
- § 1884. Cases Illustrative of the Rule.
- § 1885. Effect of a General Demurrer.
- § 1886. Illegal and Irregular Proceedings on the Part of the Municipality No Defense.
- § 1887. Indemnifying Municipalities Against Damages Resulting from the Vacation of Streets and Alleys.
- § 1888. Proceedings by Municipalities to Ascertain Damages to Private Property by Public Improvements.
- § 1889. Chancery Jurisdiction to Enjoin the Vacation of Streets.
- § 1890. Chancery Jurisdiction Invoked by Public Officers to Prevent Pre-
prestore.

§ 1880. **Introduction**—It frequently happens that in the making of public improvements private property is necessarily injured thereby. The subject is an important one and has received considerable attention at the hands of the courts, and various views of the subject presented. In reviewing the cases on this subject it will doubtless be perceived that the line of demarcation between what does and what does not constitute an injury is not clearly defined; that is, while the rule in regard to the subject is clearly stated the application of the rule to the facts is difficult. When such injuries occur the law provides that the owner of the property shall be compensated therefor. They most frequently arise from the vacation of public streets and highways or other obstructions to the same. The basis of the right to such compensation is found in the constitution of 1870, which will be more fully considered hereafter

§ 1881. Constitutional Provisions in Regard to Taking or Damaging Private Property for Public Use—Before proceeding to fully consider this matter, it would be well to call the attention of the reader to the difference between the constitution of 1848 and the constitution of 1870 in this regard.

In the constitution of 1848 it is provided: "Nor shall any man's property be taken or applied to public use without the consent of his representatives in the General Assembly, nor without just compensation being made to him."¹

The constitution of 1870 is: "Private property shall not be taken or *damaged* for public use without just compensation."²

The material differences between these two constitutions is very fully and ably considered in the case of *Rigney v. Chicago*, 102 Ill. 64. After a very careful review of the authorities in this and other states, it is said by the court:

"Whatever may be the rule in other states, it clearly appears from this review of the cases that previous to, and at the time of the adoption of, the present constitution, it was the settled doctrine of this court that any actual physical injury to private property, by reason of the erection, construction or operation of a public improvement in or along a public street or highway, where its public use or enjoyment was materially interrupted, or its value substantially impaired, was regarded as a taking of private property, within the meaning of the constitution, and actions for such injuries were uniformly sustained.

"This construction making an *actual physical invasion* of the property affected, the test in every case, excluded from the benefits of the constitution many cases of great hardship, for it often happened that while there was no *actual physical injury* to the property, yet the approaches to it were so cut off and destroyed as to leave it almost valueless. Under this condition of affairs the framers of the present constitution,

1—Sec. 2, Art. XIII, Con. 1848.

2—Sec. 13, Art. II, Con. 1870.

doubtless with a view of giving greater security to private rights by affording relief in such cases of hardship where it had been before denied, declared therein that 'private property shall not be taken or *damaged* for public use without just compensation.' The addition of the words 'or *damaged*,' can hardly be regarded as accidental, or as having been used without any definite purpose. On the contrary, we regard them as significant, and expressive of a deliberate purpose to change the organic law of the State. Nor were they used to conserve existing rights, but on the contrary, in our judgment, they declared a new rule of civil conduct, from which springs new rights which did not exist under the constitution of 1848. As we have already seen, the provisions of that constitution extended to all cases where the injury to property was *direct and physical*, as well as where there was an actual appropriation and taking. The rights of the people, therefore, under the old constitution, were conserved just as much in one of these two classes of cases as in the other, and were fully protected in both, and to say that the words 'or *damaged*' were added to the new constitution for the purpose of conserving rights pertaining to either class, is equivalent to saying that these words were added to effect a purpose that was fully accomplished under the old constitution without them—in other words, is equivalent to saying that their insertion in the new constitution was simply superfluous. There seems to be no escape from this conclusion, for the provisions in both constitutions are in effect the same, with the exception of the additional words in question. The position of the appellee that the new constitution was simply intended to conserve existing rights, and that therefore there can be no recovery in any case except where there has been an actual appropriation of, or physical injury to, the plaintiff's property, is founded in part upon certain expressions to be found in some of the cases which have arisen since the adoption of the new constitution, which

seem to recognize as still existing the old test that the injury must be direct and *physical*, where there has been no actual appropriation or taking of the property. It is hardly necessary to observe that what is said in any case upon a matter not necessarily involved in the decision, is not to be regarded as authoritative or binding. Such expressions can only be regarded as indicating the views of the members of the court, and particularly that of the writer of the opinion, upon a matter which the court is not required to, and consequently cannot, judicially determine, and hence, while they are entitled to respectful consideration, they are never accepted as authoritative. An examination of the cases, it is believed, will clearly show that no express decision to that effect has ever been made, and even if such a case could be found, it must have been without due consideration, and should not be followed, for to recognize such a rule would, in effect, as we have already shown, be to render inoperative a plain provision of the constitution.

* * * * *

“Under the constitution of 1848, it was essential to a right to recovery, as we have already seen, that there should be a direct physical injury to the *corpus* or subject of the property, such as overflowing it, casting sparks or cinders upon it, and the like; but under the present constitution it is sufficient if there is a direct physical obstruction or injury to the right of user or enjoyment by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provision, give a right of action. * * *

“The question then recurs, what additional class of cases did the framers of the new constitution intend to provide for which were not embraced in the old? While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy

under the old constitution, yet we think it is equally clear that it was not intended to reach every possible injury which might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns and cities which directly impair the value of private property, for which the law does not, and never has, afforded relief. For instance, the building of a jail, police station or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is a clear case of *damnum absque injuria*. So an obstruction of a public street—if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases to warrant a recovery it must appear that there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, which gives it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provision on the subject, the common law, afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie at common law.”³

§ 1882. Property Defined—Before proceeding to fully consider the question of damages to property it would be well to have a clear view of the legal meaning of the term “property.”

It is said: “It is conceded that some little confusion exists with respect to the use of the expression, ‘physical injury,’ in connection with the term *property*; but it is believed this arises mainly from the ambiguous character of the latter term, and doubtless all the apparent conflicting

3—Rigney v. Chicago, 102 Ill. 64.

expressions to be found in the opinions of this court upon this subject may be harmonized upon the theory that the term property, in that connection, is used in different senses. Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution; yet the term is often used to indicate the *res*, or subject of the property, rather than the property itself, and it is evidently used in this sense in connection with the expression physical injury, while at other times it is probably used in the more appropriate sense, as above mentioned. The meaning, therefore, of the expression 'physical injury,' when used in connection with the term property, would in any case depend upon whether the term property was used in the one sense or the other. To illustrate: 'If the lot and buildings of the plaintiff (in the Rigney case) are to be regarded as property, and not merely as the subjects of property, as strictly speaking they are, then there has clearly been no physical injury to it; but if by property is meant the right of user, enjoyment and disposition of the lot and buildings, then it is evident that there has been a direct physical interference with the appellant's property, and when considered from this aspect, it may appropriately be said the injury to the property is direct and physical.'"⁴

While the use of a thing is strictly speaking "property," yet the *res*—that is, the thing itself—is frequently recognized in the law as property. To illustrate, if a man steals a watch he is indicted and prosecuted for stealing the "property" of the owner.

§ 1883. General Rule Applicable to the Recovery of Damages to Private Property by Public Improvements—It is exceedingly difficult to formulate, under the authorities, a general rule applicable to the recovery of damages to pri-

4—Rigney v. Chicago, 102 Ill. 64.

vate property by local improvements. It is stated that if the closing, vacating or obstructing a street or highway by a municipal authority damages private property the municipality is liable for the same to the owner, of the property, and if the damages are not determined before the closing, vacating or obstructing the street the owner may at any time, within the statutes of limitation, sue and recover for the same, provided the injury to him is special, or are different in kind from those affecting the general public.⁵

After an extended review of a number of leading cases the court states the rule as follows:

First, for any act obstructing a common and public right no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree than any other person.

Second, an action will lie for peculiar damages of a different kind, though even in the smallest degree.

Third, the damages, if really peculiar, need not always be direct and immediate, like the loss of a horse, but may be remote and consequential, as in other cases of tort.

Fourth, the fact that many others sustain an injury of exactly the like kind, is not a bar to an individual action in many cases of public nuisances.⁶

In the case of *Aldrich v. Metropolitan West Side Elevated Railway Co.*, 195 Ill. 456, quite an extended review of the cases on this subject, both in this State and other States and in England is given, and in the latter part of the opinion it is stated: "In all cases, to warrant a recovery it must appear that there has been a direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives it an additional value, and that by reason of such disturbance he has sustained a special damage with respect

5—*Lockwood & Strickland Co. v. Chicago*, 279 Ill. 445; *Parker v. Catholic Bishop*, 146 Ill. 150.

6—*Chicago v. Bureky*, 158 Ill. 103.

to his property in excess of that sustained by the public generally.

“In the absence of any statutory or constitutional provision on the subject, the common law afforded redress in all such cases, and we have no doubt that it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie at common law.”

One of the elements of damage distinctly recognized by the cases is the physical obstruction of the right and means of access to the plaintiff's premises. *Rigney v. Chicago*, 102 Ill. 64.

It is said that the *Rigney* case, ever since its decision, has been regarded as laying down the proper rule on the subject.⁷

§ 1884. Cases Illustrative of the Rule—Having now given attention to these preliminary questions, it is proper to turn to the cases where the subject has been considered by the courts; they naturally divide themselves into two classes, which may be termed affirmative and negative—that is, those which hold that an action can be maintained, and those wherein it is held that an action cannot be maintained.

One of the first and early cases, and a leading case, is that of *Rigney v. Chicago*, 102 Ill. 64. The action was instituted by the appellant against the appellee, for the purpose of recovering damages alleged to have been sustained by the plaintiff by reason of the construction by the city of a viaduct or bridge along Halsted street and across Kinzie street at their intersection, some 220 feet west of the plaintiff's premises. There was a trial on the merits, before a court and jury, resulting in a verdict and judgment for the defendant, which judgment, on appeal was affirmed by the Appellate Court, and an appeal taken therefrom to the Supreme Court.

⁷—*Aldrich v. Metropolitan, W. S. E. Ry. Co.*, 195 Ill. 456.

The facts in the case were these: The appellant (Rigney) was the owner of a lot fronting on Kinzie street, 25 feet front by 100 feet in depth, on the front part of which was a two-story frame dwelling, and also another in the rear of it, and that he had, by himself and tenants, been in the actual occupancy of the premises ever since 1872; that the defendant constructed a viaduct (on Halsted street) in 1874, which cut off all communication with Halsted street, by way of Kinzie street, except by means of a pair of stairs at the intersection of the streets; that Halsted street is one of the main thoroughfares of Chicago, upon which was operated a line of street cars, affording communication to all parts of the city; that the rental value of the premises not occupied by the plaintiff was, by reason of the obstruction, reduced from \$60 per month to \$23, and the property itself, which was worth, before the obstruction \$5,000, was for the same cause reduced two-thirds in value.

It was not claimed or pretended that the plaintiff's possession had been disturbed, or that any direct physical injury had been done to his premises, by reason of the obstruction in question. The *gravamen* of the plaintiff's complaint is, that the defendant in cutting off his communication with Halsted street by way of Kinzie street, had deprived him of a public right which he had enjoyed in connection with his premises, and thereby inflicted upon him an injury in excess of that shared by him with the public generally, and it is for this excess that he sought to recover, and nothing more.

At the close of the evidence the plaintiff asked the court to give the jury the following instruction:

"The jury are instructed that if they believe from the evidence that the plaintiff is the owner of the property described in the declaration in this case, and that he has been such owner since the year 1872; that his property is located with respect to Kinzie and Halsted streets, as described in the declaration; that the defendant, the city of Chicago, in

the year 1874, constructed a viaduct or bridge on Halsted street, near Kinzie street, and thereby cut off and prevented access to said Halsted street from the plaintiff's premises over and along Kinzie street except by means of a pair of stairs, and the plaintiff's said premises were permanently damaged and depreciated in value by means of being deprived of such access, and that they should find the defendant guilty, and assess the plaintiff's damages at such sum as they shall believe from the evidence his said premises have been depreciated by the aforesaid cause."

This instruction was refused by the court, but the following instruction was given for the defendant:

"The jury are instructed, that, it being admitted that the fee simple title to the street in question was in the city, and the plaintiff having failed to prove any actionable injury, they should find the defendant not guilty."

The law applicable to these facts and instructions is fully stated by the court, and is hereinbefore shown, so that it will not be necessary to repeat them here.

Another leading case is that of *Chicago v. Burcky*, 158 Ill. 103. It was an action brought by Burcky to recover damages sustained by her to a tract of land fronting east on State street 337 feet and south on 61st street 558 feet, caused by the vacation of a portion of 61st street.

West of the plaintiff's property were several railroad tracks belonging to several railroad companies which crossed 61st street at right angles. Just south of 61st street the railroad companies owned a large tract of land which was used by them for switching tracks, and other usual railroad business, and was covered with railroad tracks. The municipal authorities and the railroad companies considered the crossing at 61st street as dangerous, and an ordinance was passed authorizing the making of a contract with the railroad companies whereby the companies were to erect on a strip of land 25 feet wide belonging to them, and adjoining the south line of 61st street, a viaduct, ex-

tending from a point 170 feet east of the east line of Wentworth avenue to a point 210 feet west of the west line of State street, the municipal authorities to build the approaches thereto from Wentworth avenue and State street. When completed the viaduct and the approaches to become a public highway. When the companies completed the building of the viaduct the municipal authorities, by proper ordinance, were to vacate that part of 61st street at the railroad tracks, commencing 139 feet east of the east line of LaSalle street and running to a point 198 feet further east and to the west line of the plaintiff's property. The viaduct was duly built, and the 198 feet of 61st street was vacated.

At the trial, after the evidence was all introduced the defendant requested the court to instruct the jury as follows:

"The jury are instructed, that, it being admitted that the fee simple title to the street in question was in the city, and it appearing from the evidence that the property claimed to be damaged does not abut upon that portion of 61st street that was vacated, but is situated in another block which is east of the block in which the portion of 61st street was vacated, the plaintiff has failed to prove any actual injury on account of the said vacation of 61st street, and all evidence of any damage done to the plaintiff's property by reason of said vacation is not to be considered by the jury in arriving at a verdict in this case."

This instruction was refused and the decision is relied upon as error.

In the opinion of the court it is said: "The viaduct and its approaches, constructed on the south line of 61st street, were about one-quarter of a mile long, and extended from Wentworth avenue to State street. The construction of the viaduct opposite to the plaintiff's land prevented the laying out of any streets south and stopped all travel in that direction, while the vacation of that portion of 61st street crossed by the railroad tracks stopped all travel west, so

that the property of the plaintiff abutting on 61st street was shut in, and all access shut off from the south and from the west. By the construction of the viaduct south of the plaintiff's property and by closing the street west of the property, and thus stopping all communication south or west, it is plain that the plaintiff's property was seriously damaged."

But it is contended that the damages she has sustained are not special in their character, and are of the same kind as those sustained by the general public, and upon this ground no recovery can be had. The court then proceeds to review a large number of authorities, where the distinction between special damages sustained by a private individual and those sustained by the general public are considered, and states the rule governing such cases as above set forth, and proceeds as follows: "In this case we think the plaintiff was entitled to recover. Her property fronted on 61st street. It extended west to and connected with that part of the street which was vacated. By the vacation of the street and the erection of the viaduct, her property extending from the railroad tracks east to State street was shut in, and all access from the south and west shut off. What was originally a thoroughfare along the entire line of the plaintiff's property fronting on 61st street was by the action of the town turned into a blind court. No other property was damaged or affected in the same way, except a small tract lying between Wentworth avenue and the railroad tracks. The property of the general public was not affected like the plaintiff's, nor was the damage sustained by the public of the same kind. Before the action taken by the town, plaintiff's property, fronting on 61st street, was so situated that it was available as lots for business purposes, but after the action of the town it was rendered useless for that purpose." And the judgment of the trial court was sustained.⁸

⁸—Chicago v. Bureky, 158 Ill. 103.

In the case of *Chicago v. Jackson*, 196 Ill. 496, the plaintiff alleged in his declaration that his property fronted on West 40th street and that prior to the acts complained of there was direct and convenient access to the same from the street, as well as egress therefrom for persons and vehicles. He averred in his declaration that regardless of the rights of the plaintiff the defendant wrongfully excavated the said street in front of his premises, and constructed thereon a subway of great depth below the grade of the street, as it existed prior thereto, and charged that by means thereof the free and convenient access to his premises and free communication between his premises and the street had been entirely destroyed and cut off, and the premises rendered unfit for the use to which they were best adapted and for which they were most valuable, and the reasonable enjoyment and use of the same seriously interfered with, by means of which his rights in the premises had been violated; that the excavation and subway were without his consent and without making any compensation to him for his damages, and without any proceeding to ascertain such damages, as provided by law, and that the defendant has refused and still refuses to make such compensation.

The city filed a plea of not guilty, upon which issue was joined and the case tried by a jury. At the close of all the evidence the city asked the court to instruct the jury to find for the defendant, but this was denied and an exception taken. The jury were instructed that "if they believed from the evidence that the plaintiff's property was depreciated in its fair market value by the change of grade in the street, over and above any benefit conferred upon the property by the improvement, taken as a whole, they should find the defendant guilty and assess the plaintiff's damages at such sum as they believed, from the evidence, and under the instructions of the court, such property had been depreciated in its fair cash market value by reason

of such change of grade." To the giving of such instruction the defendant duly excepted. A verdict was rendered in favor of the plaintiff and his damages fixed at \$2,000, upon which the court entered judgment.

It appeared by an ordinance of the city introduced in evidence by the defendant that the Chicago and Northwestern Railroad Company was required to elevate the plane of its road and tracks across this and other streets so as to obviate the grade crossings, that the company having at the time its railroad tracks across the street on the same level. The ordinance fully described the nature, character and location of the proposed improvement.

The improvement on the plaintiff's premises was a two-story brick building, the first story being occupied as a saloon and the second story for roomers. The first floor, prior to the excavation, was nearly on a level with the street. In making the subway the railroad company cut down the street in front of the building, so that the sidewalk is four feet above the roadway and the floor of the building four feet above the sidewalk, making the floor eight feet above the grade of the street and requiring seven steps in the sidewalk at the northwest corner of the plaintiff's building and seven steps from the sidewalk in order to reach the first floor of the house. It was not denied that the property was damaged in the manner alleged.

The theory of the plaintiff's case was, that the city having thus changed the grade of the street, or caused the same to be done, so as to damage his property, he is entitled to recover under that provision of the constitution which provides "private property shall not be taken or damaged for public use without just compensation." The city insisted that there could be no recovery for the reason that private property had not been taken for public use, but whatever injury had been done to the plaintiff's property was the result of the legitimate exercise of the police power of the State and the damages were *damnum absque injuria*.

Therefore it was insisted that there was error in the trial court in refusing the peremptory instruction to find for the defendant and the giving of the instruction on the part of the plaintiff.

It is said by the court: "The question in this form is a new one in this State, and so far as we have been able to ascertain, has never been decided by any court. It is a question of the first importance both to the city and property holders upon streets upon which the railroads of the city must be elevated, in the interests of the public safety to life and property."

It would seem from an examination of the ordinance that the improvement was made rather by the agreement of the parties than by the order or command of the city, and that both parties understood and contemplated damage to private parties as a result of the work. It was, however, conceded by all parties that the municipality had a right, in the legal exercise of its police power within reasonable limits to require the railroad company to elevate its tracks so as to avoid the grade crossing upon the street, and thus protect the lives and property of the citizens.

In regard to the police power of the municipality, and its application to the facts in this case, the court says:

"It is well settled that every corporation and citizen holds its or his property subject to the proper exercise of this power, either by the State legislature directly, or by corporations to which the legislature has delegated it. Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled police laws and regulations; and it is well settled that laws and regulations of this character, though they may destroy the enjoyment of individual rights, are not unconstitutional, though no provision is made for such disturbance. They do not appropriate private property to a public use, but simply regulate its use and enjoyment by the owner. If he suffers injury it is either *dam-*

num absque injuria, or, in the theory of the law, he is compensated for it by sharing the general benefits which the regulations are intended and calculated to secure. The maxim of the law is, '*salus populi est suprema lex*'—the safety of the people is the supreme object of the law. It is not a taking of private property for public use, but a restraint upon the wrongful use of the property by the owner, in violation of the rule, *sic utere tuo ut alienum non loedes*.

"The cases in which the right to exercise the power has usually arisen, are cases in which the State or some municipal corporation, to which the power has been delegated, has asserted the power, and the party defending in such cases has been the one against whose conduct or property the power was sought to be enforced.

"While the limit of the power cannot be accurately defined and the courts have not been willing definitely to circumscribe it, still courts have generally found no great difficulty in determining whether or not it has been legally and reasonably exercised in a given case.

"It seems to be thought by the counsel for the city that inasmuch as the railroad company has been lawfully compelled to abandon its tracks on the street and so elevate them as to overcome the grade crossing, at great loss and expense to it, without compensation, neither should the plaintiff, who has suffered loss on account of the construction of the same work, be allowed to recover damages therefor. The position, upon first impressions, seems plausible, but when carefully considered it is clearly untenable. The relations of the parties to the city are entirely different. That which called for the exercise of the police power by the municipality was the operation of the railroad in running its trains across the street. Neither the location nor the use of the plaintiff's property endangered the public health or safety, and it must be admitted that if the city had attempted to interfere with that property by obstruct-

ing his access hereto under any claim of a police regulation, it would have been a flagrant abuse of the police power and no defense whatever to an action for the resulting damages. The plaintiff bears no relation to the railroad company. He had nothing to do with the operation of the road. He makes no claim in his declaration on account of the elevation of the tracks. His cause of action is against the city for changing the grade of the street so as to damage his property. Police power is very broad and comprehensive, and is exercised to promote health, comfort, safety and welfare of society, but there is no particular magic or potency in the term. Rights of property cannot be invaded under the guise of the police power. All embracing and penetrating as the police power of the State is, and of necessity must be, it is nevertheless subject, like all other legislative power, to the paramount authority of the State and Federal constitution. A right conferred or protected by the constitution cannot be overthrown or impaired by any authority derived by the police power. It is undoubtedly true that the State, through the legislature, has the right to determine what shall be a reasonable exercise of the power, and so the municipal corporation, through its delegated power, may do so, but it cannot arbitrarily attribute the doing of a thing to the police power whether reasonably done or not. It is a question finally for the courts to determine whether or not an act is within the police power. There is a limit beyond which it cannot go and within which it will be confined by the judicial power of the State."

"We think the trial court properly refused to take the case from the jury and committed no error in giving said instruction." 9

Annie Clifford commenced an action against the Village of Winnetka to recover damages alleged to have been sustained by reason of the closing of Maple street in said vil-

lage, across the right of way of the Chicago & Northwestern Railroad. The case was tried and verdict and judgment rendered in favor of the plaintiff, from which an appeal was taken to the Appellate Court, where the judgment was affirmed and the case taken to the Supreme Court by writ of error.

The plaintiff was the owner of that part of the block lying south of the railroad right of way.

Maple street was an old country road running through the village and crosses the right of way near the southwest corner of the block. Willow street on the south also crossed the right of way near this corner of the block. Near where the right of way crossed the west line of the block stood a brick store belonging to the plaintiff, and on Willow street there was a frame dwelling house on the lot. There was a good well on the lot and the water mains on Maple street. The village entered into an agreement with the railroad company by which the village agreed to close Maple street across the right of way and the company agreed to build a subway on Willow street under its right of way. The village built a fence across Maple street along the right of way. The subway was constructed on Willow street. The traffic that formerly passed along Maple street had to go around along other streets and the rental value of the store building of the plaintiff was greatly depreciated; the well on the premises was greatly damaged by the construction of the subway on Willow street, and the water mains on Maple street were shut off by the village. Maple street became a *cul de sac*, or blind alley terminating in front of the plaintiff's premises.

It was contended by the defendant that the damage sustained by the plaintiff by the closing of Maple street was in no way more than that sustained by other persons in the village who might have occasion to pass that way, and although the closing of Maple street might cause her greater inconvenience, still that fact would not entitle her to re-

cover. The court refers to the principle stated in the Rigney case in regard to the physical obstruction to the right of user or enjoyment of property, and states: "Whenever there is such an injury to the owner's right of access to and use and enjoyment of his property which is not common to the public generally, he has a right of action." Citing a large number of cases. Then states: "The closing of Maple street across the tracks turned into a blind court directly in front of the property of the defendant in error, whereby her property sustained an injury different and distinct from that sustained by the public."

The following instruction was asked by the defendant and refused by the court which is assigned for error, "The jury are further instructed that if they believe from the evidence that the plaintiff has sustained special damages by reason of the vacation of Maple avenue across the tracks of the railroad company, and if you further believe that the construction of the subway on Willow street was a direct pecuniary benefit to the plaintiff's property then it is your duty to consider such benefits, and if you believe them equal to or in excess of such damages, then your verdict should be for the defendant."

In regard to this instruction the court say: "This instruction directed the jury to consider the alleged pecuniary benefit received by the property from the construction of the Willow street subway, and to set it off against the damages alleged to have been received by the closing of Maple street across the railroad tracks. It ignored entirely the injury to the well which was specifically averred in two of the counts of the declaration. While it was proper to direct the attention of the jury to the alleged benefit accruing from the construction of the subway, it was not proper to set them off only against a portion of the damages. The correct measure of damages was stated in an instruction given for the plaintiff in error to be "the difference, as shown by the evidence, between the fair cash market value

of the said property before the subway was constructed on Willow street and before Maple street was closed, and the fair cash market value of said property after said subway had been constructed on Willow street and after said Maple street had been closed as a whole." The judgment was affirmed.¹⁰

The case of *Beidler v. Sanitary District of Chicago*, 211 Ill. 628, is an important one affecting various questions involved in the subject under consideration, and is of such a character as demands full and careful consideration on the various subjects of damages to private property by public improvements, riparian rights, rights under prescription, measure of damages, and proper pleading.

The suit was brought by George Beidler and others, who are the owners, as tenants in common, of the property mentioned against the Sanitary District, to recover as damages the amount expended by the plaintiffs in deepening or lowering the canals afterward mentioned, and repairing certain docks fronting on said canals and the south branch of the Chicago river, and for permanent injury to said property the nature of which is not specified.

More than twenty years prior to January 17, 1900, the South Branch Dock Company was the owner of a large tract of land, divided into lots, in Green's South Branch Addition to Chicago. Some of these lots fronted on the south branch of the Chicago river which was and is a natural navigable water course opening into Lake Michigan, but a large majority of the lots lay north of the lots fronting on the river. The dock company had excavated and constructed a number of large canals through the property so owned by them, extending north from the river several hundred feet and connected therewith, and then so subdivided the property that each lot not fronting on the river would front on one of the canals. The canals opened upon

475.

10—*Winnetka v. Clifford*, 201 Ill.

the river, which, in turn, emptied into Lake Michigan. The river supplied them with sufficient water to keep their depth at about seventeen feet at all times. This was their only source of water supply. They varied in length, the longest extending back from the river 2,560 feet, and were wide enough to admit large barges, steamboats, ships, and other vessels, and such vessels passed to and from points within each of said canals into Lake Michigan by means of said canals and river, and conveyed lumber, goods and merchandise to and from said points by means thereof. Plaintiff's premises, fronting on the canals and on the river, contained valuable docks which were used in connection with the loading and unloading of said vessels.

After constructing this system of canals the dock company conveyed sixty-six of these lots to Jacob Beidler, and at the latter's death the title passed to the complainants by descent. Seven of these lots fronted on the river. Each of the remaining lots fronted on one or the other of these canals. The lots are leased to tenants who use them for lumber yards and for dock purposes under leases which provide that the lessors shall at all times keep a sufficient amount of water in said canals to furnish means of access for vessels to the premises. The lots fronting on the river extended to the center thereof, and those fronting on the canals extended to the middle of such canals.

The defendant drainage district, which is a public corporation, on January 17, 1900, connected its drainage channel, constructed for sanitary purposes, with said branch of the Chicago river and large quantities of water have ever since flowed from the river into said channel, which diminished the supply of water in the river and in each of the canals, lowering the water six feet, which made the canals too shallow for large vessels to enter the canal or reach the premises of the plaintiffs which fronted on the canals. Plaintiffs were therefore compelled to excavate or deepen the canals to the extent that the water had been lowered therein, which they did at an expense of \$10,000. The docks

along the river and the canals were rendered useless by reason of the water being lowered therein by the drainage channel, and the plaintiffs repaired them at a cost of \$15,000.

The defendant filed a general demurrer to the declaration which, being sustained, the judgment was for the defendant. Plaintiffs appealed, claiming that there had been a taking of private property without compensation, within the meaning of section 13 of article 2 of the constitution of the State; that sections 8 and 19 of the Drainage Act of 1889, under which appellee was created, gives them a right of action; that they are entitled to recover under their common law rights as riparian owners for a diversion of the water whereby they have been injured.

It is difficult to scientifically abstract the opinion of the court, and it will be necessary to copy a large portion of it, to give the reader a clear idea of the points involved. It is said: "Appellants are the owners of sixty-six lots, all of which they claim are damaged by the act of the Sanitary District of Chicago in lowering the general level of the water in the South Branch of the Chicago river. Seven of these lots abut on this branch of the river. The others front on canals leading at right angles to the general course of the stream. It is contended by appellee that the appellants have no riparian right appurtenant to those lots which do not abut on the river, and this presents the first question for our consideration."

"At the time the canals were excavated, the real estate through which they extended was the property of one owner. More than twenty years intervened between the construction of the canals and the opening of the principal channel of the sanitary district, the opening of which reduced the level of the water. After the canals were opened the owner of the land subdivided the same into lots facing or abutting on the canals, except a few immediately contiguous to and fronting on the river. These lots the owner sold from time to time without reservation."

"Under the law of this State, the owner of lots on each

side of a river is also the owner of the bed of the stream to the center of the stream (citing a number of cases), subject only to the right of the public to the free and undisturbed navigation of the river. A riparian owner has the right to use the water in the stream. This includes the right to take a reasonable quantity of the water for his own purposes. The limitation and extent of the use of the water is that it shall not interfere with the public right of navigation nor in a substantial degree diminish or impair the rights of use of the water by other riparian owners."

"These canals had been continuously supplied with water for more than twenty years prior to the opening of the sanitary channel. This court has on various occasions held that the right to have water flow in an artificial channel and to flood land which it would not overflow naturally may be acquired by prescription." (Citing a number of cases.)

"It is suggested by the appellee that these cases all involve the relative rights of private parties and that no such right can be acquired by prescription against the public. The right of the public in this stream is the right of navigating it. No right can be acquired by prescription which will interfere with this right of navigation. It does not appear from the declaration in this case that the filling of these canals with water from the river interfered in any wise with navigation. In view of the length of the canals and the amount of water necessarily required to fill them to the level of the river, the diversion of the water to the canals was an appropriation of the water adverse to the rights of other owners of abutting property and as the appropriation did not violate the right of navigation, the owner of each lot fronting on the canals acquired, by prescription, the same riparian rights in the waters therein that he would have had if the canals had been natural waterways and, under the authorities above cited, his title extended to the middle of the canal.

“Section 13 of article 2 of the constitution of the State provides: ‘Private property shall not be taken or damaged for public use without just compensation,’ and the question here presented is whether the damage sustained by the appellants is within the language of the constitution.

“Section 19 of the act creating the drainage district provides: ‘Every sanitary district shall be liable for all damages to real estate within or without such district which shall be overflowed or otherwise damaged by reason of the construction, enlargement or use of any channel, ditch, drain, outlet or other improvement under the provisions of this act.’ ” * * *

“It is the right of every owner of land over which a stream of water flows to have it flow in its natural state and with its quality unaffected. The right to a stream of water is as sacred as the right to the soil over which it flows. It is a part of the freehold of which the owner cannot be disseized except by due process of law, and the pollution of a stream constitutes the taking property, which may not be done without making compensation.

“Now, if the owners of the various lots abutting on the canals in question have acquired by prescription the same rights to the enjoyment of the use of the water in these canals at the ordinary level that they would have, had these canals been natural and not artificial waterways, it is apparent that it is their right to have the water flow into the canals to the same height that it did prior to the opening of the drainage district channel.

“It is urged in opposition to this view that the title of the riparian owners is subordinate to such use of the water as may be consistent with or demanded by the public right of navigation, and that the rights of the plaintiffs are subject to the paramount right of the State to make any and all improvements to facilitate navigation; and it is argued that section 24 of the Sanitary District Act declares that the drainage channel is a navigable stream, conse-

quently reducing the water in the Chicago river for the purpose of filling the sanitary channel was in the interest and for the purpose of navigation, and that the rights of the plaintiffs were subject to the rights of the public to make any and all improvements to facilitate navigation, the damages inflicted are not of a character for which recovery may be had. To this there are two answers: While it is true that the rights of the plaintiffs are subject to the public right of navigation, and the damages resulting in consequence of any kind of work by the public for the purpose of improving navigation are damages for which no recovery can be had, still it must be manifest that the right of navigation and the right of improvement for the purposes of navigation which are superior to the rights of the plaintiffs must be the right to navigate the south branch of the Chicago river and to improve navigation in that branch or some stream or lake whose waters naturally flow into that branch or into which branch naturally flows. Here the waters are taken and their general level reduced for the purpose of making navigable an artificial channel, and not for the purpose of facilitating the navigation of the south branch of the Chicago river or any stream or body of water naturally emptying into it or any stream or lake into which it naturally empties.

“Again, it is evident from an examination of the act creating sanitary districts, that the primary and principal purpose of their creation under the statute is to provide for the preservation of the public health by improving the facilities for the final disposition of the sewerage and by supplying pure water. The fact that a navigable waterway may be created is a mere incident, and not one of the purposes for which a sanitary district is created.

“The appellee cites a large number of cases in which it has been held that there can be no recovery for damages resulting from a proper exercise of the police power for preserving and safeguarding the public health, and argues that the declaration here does not state a cause of action,

as the channels of the sanitary district were constructed for the purpose last mentioned under and by virtue of the police power of the State. This doctrine is applicable where compensation is claimed for taking of property, or for damaging property not taken, where the damages result from some direct physical injury to the corpus of the property itself, or from the fact that the law prescribes some particular manner in which it shall be used or some particular manner in which it shall not be used, and where the character and condition of the property, whether taken, or damaged without being taken, is such that it is necessary that it shall be taken or damaged for the purpose of preserving the public health, or for some other purpose which sets in motion the police power; as where a slaughter house or a soap factory, located in a city, is abated under regulations in reference to nuisances; where the erection of buildings of combustible material is prohibited within certain limits; the seizure and destruction of intoxicating liquors under prohibitory statutes; the seizure and destruction of gambling instruments and appurtenances under laws authorizing such course, or where the law requires the property owners to fill open cesspools in use by them upon their property.

“In the case at bar there was nothing in the condition or character of the property of the plaintiff which rendered it necessary or desirable that it should be taken or damaged in the exercise of the police power. It is evident that the lowering of the level of the water obstructed ingress and egress from the lots in question and following the reasoning in the case of the *City of Chicago v. Jackson*, 196 Ill. 496, we hold that the obstruction is a damage to private property for public use, within the meaning of section 13 of article 2 of the constitution of this State, for which compensation may be recovered from the sanitary district, under and by virtue of section 19 of the act authorizing the creation of the district.”

Measure of Damages—“It appears from the declaration

herein that when the level of the water was reduced, plaintiffs deepened the various channels passing through their property so that there would be the same depth of water that there was before the opening of the channels of the sanitary district, and made such change in the construction of their docks as was necessitated by the deepening of the canals and they seek to measure their damages by the expenses of making these excavations and changes, and contend that they cannot recover damages from acts which they permitted to continue without making reasonable efforts to prevent them and that it was their duty to make the excavations and changes and thereby lessen the damage which would be occasioned by interference with their business consequent upon the inability of vessels to land at their docks.

“Where the plaintiff by the exercise of reasonable diligence prevents or lessens damages which his property would otherwise sustain through the negligence of another, no doubt the expenditure that he has made in so doing may be considered in ascertaining the amount of his damages, but where property has been damaged, though not taken, by a public improvement, and the damages are of such a character that recovery may be had, the measure of damages is the difference in the value of the property before the improvement was constructed and the value of the property after the improvement is completed.

“Where an action is brought to recover damages, where no part of the plaintiff’s property has been taken but merely damaged by public improvement, the law is well settled that a recovery cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair market value of the property is as much immediately after the construction of the improvement as it was before the improvement was made, no damage has been sustained, and there can be no recovery.”

§ 1885. **Effect of a General Demurrer**—"The defect in the declaration, arising from the fact that the damages were claimed by an incorrect measure, is one which cannot be reached by a general demurrer, which was the only method by which this pleading was tested. This declaration stated a good cause of action, notwithstanding it does not adopt the correct measure for determining the amount of compensation to which the plaintiffs are entitled." Judgment reversed.¹¹

The case of the Village of Grant Park v. Trah, 218 Ill. 516, was an action on the case brought by Trah against the village to recover damages to the plaintiff's property occasioned by the construction of a cement sidewalk in front and along the side of his property. A trial before a jury resulted in a verdict for the plaintiff fixing his damages at \$1,260, and judgment was rendered on the verdict. The judgment was affirmed by the Appellate Court, and the village prosecuted an appeal to the Supreme Court.

The appellee purchased these lots in 1884. They fronted east on Main street and the south side of one of the lots was on Taylor street. During that year the appellee erected a brick building on the corner of Main and Taylor streets and another immediately north thereof. Both buildings were of brick and rested on stone foundations. The top of the foundations and the lower ends of the door sills were about two feet above the ground. Shortly after the buildings were erected a board sidewalk was laid on Main street in front of the lots and on Taylor street. The grade of the walk was furnished by the village engineer. In 1902 the village passed an ordinance for the construction of a cement sidewalk in front and along the side of these lots. The ordinance particularly specified the grade of the walk to be laid, and required the owner of the property to construct the same within thirty days and that in default thereof the

11—Beidler v. Sanitary District of Chicago, 211 Ill. 628.

sidewalk would be constructed by the village, and one-half of the costs should be collected by special taxation on these lots. The owner having failed to construct the walk within the time specified in the ordinance, the village laid the same in accordance with the specifications and grade mentioned in the ordinance. The grade was considerably above that of the board sidewalk previously laid, and the cement sidewalk, as constructed, was from three and one-half inches to twelve and one-eighth inches above the thresholds of the doors of the buildings on the lots. There was an abundance of evidence to support the verdict. The amount charged against the appellant's lots for the construction of the sidewalk was \$196.75, which was one-half of the cost of constructing the same. The appellee had not paid the said sum, and no judgment had been rendered against the lots therefor. At the close of all the evidence the village asked the court to instruct the jury to find in favor of the defendant, which the court refused.

The appellant contended that the peremptory instruction should have been given because the law, as heretofore announced by the court, does not permit the plaintiff to show that his property was damaged by the construction of the sidewalk, and it is said:

"In this connection numerous decisions of this court are called to our attention where it has been held that the determination by a village board or city council that a sidewalk shall be constructed by special taxation is a determination that the property so specially taxed is benefited to the extent of such tax, and that the question whether the decision of the village board is correct cannot be inquired into by the courts; and the appellant urges that it necessarily follows from these decisions that such determination of the village board is also a finding that the property has not been damaged, and the courts are concluded from investigating that question except in cases where the ordinance under which the improvement is made is unreasonable or oppressive.

"The decisions referred to by the appellant were rendered in cases which arose on application for judgment for delinquent taxes levied under the sidewalk act of 1875, or under other statutes providing for the making of local improvements by special taxation. They are not applicable to a case brought by a property owner to recover damages occasioned by a change of grade, even though such change in grade is made while constructing a sidewalk or other local improvements, for reasons which are apparent upon a consideration of the question.

"In the case at bar the sidewalk, without taking into consideration the change of grade, was a benefit to the property, while the change of grade, without taking into consideration the sidewalk, was a damage to the property. The village had authority to determine the extent of such benefit, but it had no power to determine the extent of such damages, because the change of grade was a damage to private property within the meaning of section 13 of article 23 of the constitution of 1870, * * * which guaranteed the appellant the right to have his damages ascertained by a jury.

"The separate consideration of the benefits derived from an improvement and the damages caused by the property from making such improvement has been recognized by this court." (Citing a large number of cases.)

"No provision is contained in the sidewalk act of 1875 for ascertaining the just compensation to be made for damages caused to private property by reason of changing the grade in the construction of sidewalks, and it necessarily follows that appellee is entitled to have such damages ascertained in this suit."¹²

The cases in which it was held that damages could not be recovered are substantially as follows:

An action was brought by James O'Flynn against the City of East St. Louis to recover damages alleged to have

¹²—Grant Park v. Trah, 218 Ill. 516.

been occasioned to a lot of ground owned by him by the wrongful conduct of the defendant. It is recited in the declaration that the defendant is an incorporated city, and had exclusive control of certain streets within the corporation limits, viz.: Trendly street, Church street and Pratt street, running at right angles with the Mississippi river on the east bank and from thence eastward to the old bed of the river, near the mouth of Cahokia creek, and also Front street, Second, Third and Fourth streets, running parallel with the river and with each other, and also all alleys lying within the district bounded by the streets named; and the duty of said defendant to keep said streets and alleys open, clear of obstruction, and in good repair for the use of the inhabitants of the city and the adjacent owners, is then averred in the usual ample form. It is further alleged that the plaintiff was the owner and in the possession of certain premises fronting west on Third street and east on a thirty-foot alley, on which there was a frame dwelling house and outbuildings and other valuable improvements, and, by way of a breach of duty on the part of the defendant, it was then averred that the city by ordinance vacated certain streets and alleys lying between Front street and Fourth street, and authorized the Cairo & St. Louis Railroad Company to take possession of all that part of said streets and alleys lying between Front and Fourth streets and a line parallel with Trendly street and seventy feet northward thereof and the entire length of Church street, and permitted the railroad company to make certain use of the land lying or bounded by the streets named, all of which alleged wrongful acts, it was averred, injuriously affected the plaintiff's property. Only the general issue was pleaded by the defendant, and on trial the jury found for the plaintiff and assessed his damages at \$850. The judgment rendered upon the verdict was affirmed by the Appellate court, a majority of the judges of that court having made a proper certificate for that purpose, the defendant brought the case

to the Supreme Court on a further appeal. There is no suggestion that the streets and alleys mentioned in the ordinance were not properly vacated. No one made any complaint on that score. The plaintiff's premises are situated in another block. Although the lot in controversy fronts on Third street, it is some distance from that part of Third street which was vacated by the ordinance. The only question that can be considered by the Supreme Court is purely a question of law—(by statutory limitation. Sec. 89, Ch. 110, R. S.) And it is said in the opinion: "It is, can the defendant, as a matter of law, be held liable to the plaintiff for damages resulting from the vacation of streets and alleys between Front and North streets—the vacation being in another block in the city than that in which the plaintiff's property is situated.

"Much of the argument in support of the plaintiff's right to recover in the case proceeds upon the erroneous assumption the property has been 'taken or damaged' for public use, and is, therefore, within the constitutional provision that 'private property shall not be taken or damaged for public use without just compensation.' The proposition, as formulated by counsel, is, this property has been damaged, and to the extent of this injury it has not only been 'damaged' but 'taken' within the strict letter and spirit of this provision of the constitution. The difficulty is, the position taken on this branch of the case has no support on anything contained in the record. It is not true in fact or law, that the defendant has either taken or damaged plaintiff's property for 'public use.' It has taken no property for public or any other use. That of which complaint is made is vacating certain streets. In no sense can that act be construed as either taking or damaging private property for public use, as these terms are used in the constitution. It is true, the vacating ordinance contains many provisions, and, perhaps, a contract between the city and the railroad company in relation to the use to be made of the vacated

streets and alleys, and the land owned by the railroad company that abutted on such streets and alleys; but that fact does not aid the plaintiff's right of recovery in this action, if the streets and alleys were legally vacated, as they seem to have been.

"It, therefore, seems plain, if the plaintiff can recover at all, it must be under the provisions of section 1 of the act in force July 1, 1874, in relation to 'vacation of streets, alleys and highways,' which provides, when property is damaged by the vacation or closing of any street or alley, the same shall be ascertained and paid for as provided by law. The rule on this subject was stated by this court in the case of the City of Chicago v. Union Building Association, 102 Ill. 379, where it was said, for any act obstructing a public and common right no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree. Accordingly, on the authority of that case, it was held in *Little v. City of Lincoln*, 106 Ill. 353, the rights or privileges of other proprietors in the plat, which the statute protects, are necessarily legal rights and privileges and such parties cannot, therefore, be affected by the closing of streets not adjacent to their property, nor directly affecting access thereto and egress therefrom. The facts of the case being considered bring it precisely within the principle of the cases stated. Here, the plaintiff's lot is not adjacent to the streets or alleys vacated. It is in another block. Access to and egress from his lot is not affected by the vacating ordinance passed by the city. The street in front and the alley in the rear of his property remain open as before, affording the same access to and egress from it. The inconvenience that would be occasioned the plaintiff in going from the street in front of his house to a particular part of the city, on account of the vacating and closing up certain streets and alleys in another block, is the '*same kind*' of damage that would be sustained by all other persons in

the city that might have occasion to go that way, and although the inconvenience he may suffer may be greater in degree than any other person, that fact would not give him a right of action." And the judgments of the Appellate Court and trial court were reversed.¹³

The case of *Hohmann v. Chicago*, 140 Ill. 226, was brought by the plaintiff to recover for damages done to the leasehold of the plaintiff and to his business by the erection of a viaduct by the city on North Western avenue over Kinzie street. That street and Fulton street next south of it runs east and west across North Western avenue. Most of Kinzie street and a portion of the land adjoining it is occupied by the tracks of several railroads, and for the purpose of providing a convenient way over these tracks the city in the summer of 1888, built a viaduct over them on North Western avenue, the southerly approach of which commenced at or near the corner of Fulton street.

The premises of the plaintiff were situated at the northeast corner of Fulton street and North Western avenue; he was in possession of them under a written lease for a term commencing May 1, 1888, and ending April 30, 1893, at a yearly rental of \$1,000; the first floor of the house was occupied by the plaintiff as a saloon and the upper floor by his family as a residence. It was alleged in the declaration that in his saloon business he had a large, profitable and valuable custom and patronage and that by reason of the location of the premises and the facility and convenience of access to and egress from them; that said North Western avenue was a public street in said city and it was the duty of the city to keep the same free from all obstructions thereon in front of said premises, whereby there might be full, complete and unimpaired access to and egress from said premises and full enjoyment of said premises and the easement of light and air; that the city, regardless of its

13—*East St. Louis v. O'Flynn*, 119 Ill. 200.

duty, erected said viaduct, with one of the approaches thereto in front of said premises, whereby the access to said premises was cut off and made impracticable and the easement of light and air greatly diminished, disturbed and impaired whereby the leasehold interest in said premises had been and was greatly depreciated in value, and the traffic and travel on North Western avenue had been greatly lessened, diverted, obstructed and cut off and diminished to such an extent that the receipts of said business since and during the construction of said viaduct and approaches had been reduced and caused to fall off, to-wit \$400 per month. The defendant pleaded not guilty and on a trial the verdict and judgment was for the defendant. Appeals were prosecuted so that the case finally reached the Supreme Court.

For the purpose of showing that the plaintiff's patronage and business had been injured and diminished by the building of the viaduct and approaches and also for the purpose of showing the diminution of the market value of the leasehold estate, the plaintiff was offered as a witness for the purpose of proving the average monthly receipts of the plaintiff's saloon business at its former location, about 150 feet north of its present locality, for the six months next preceding the erection of the viaduct and approaches, and compare the same with the average monthly receipts for the same period in his new location since the viaduct was built. This evidence was excluded by the court, and its exclusion was now assigned for error. There was no error in excluding this evidence. Even if it be admitted that a diversion of customers from the plaintiff's saloon and the diminution of his business in consequence thereof, it is not thought that a comparison of his receipts in his present locality with those carried on in a former period in a different locality, and with different surroundings, would tend to show such diversion.

But it seems plain that a diversion of customers from the

plaintiff's saloon business is not an element of damage for which the plaintiff could recover. It was not pretended that access to his premises was cut off, nor that travel on said avenue was cut off, but only that it was diminished. This seems to have resulted from two causes, first, because heavily loaded teams preferred not to drive over the viaduct on account of the steepness of the approaches, and secondly, because persons coming on foot from the railroad yards or from the railroad station preferred to go some other way rather than ascend the stairs leading from Kinzie street to the roadway of the viaduct.

But this constitutes no element of legal damage. Admitting the plaintiff's right to have said avenue so kept as not to cut off free access thereto from his premises, he had no vested right to have it so kept as to attract the larger amount of travel to his premises, so as to bring a larger number of customers to the bar of his saloon. To illustrate, if the city had seen fit to improve other streets so as to make them much more desirable than the avenue, and thereby diverted a large part of the public travel from said avenue, so that they no longer passed the plaintiff's saloon, the effect upon his business would have been the same, but no one would contend that a right to damages would thereby accrue to the plaintiff. So since the plaintiff would have no legal right to complain, the evidence offered was wholly immaterial, and was properly excluded.¹⁴

In the case of *Frazer v. Chicago*, 186 Ill. 480, the appellants brought a suit against the city seeking to recover damages to their property by reason of the erection and maintenance by it of a smallpox hospital situated on the east side of Lawndale avenue within the city immediately opposite the property of the appellants.

The declaration consisted of five counts in which the cause of action was variously set out, the material allega-

¹⁴—*Hohmann v. Chicago*, 140 Ill. 226.

tions being that the maintenance of the hospital for the purpose of isolating those affected with the disease rendered the plaintiff's property much less adequate for investment purposes, and limits the use which plaintiff might otherwise make of the land; that such acts of the defendant constituted a permanent injury for the benefit of the public, within the meaning of the section of the constitution prohibiting the damaging of private property for public use without just compensation, whereby the plaintiff had sustained special damages not common to the general public; that the collection of the patients at the place designated rendered ingress and egress to and from the plaintiff's property upon and along Lawndale avenue—by which public highway alone egress and ingress was then possible—unsafe and dangerous to travel upon foot or in carriages or other vehicles and greatly interfered with the private property rights of the plaintiffs as the owners of the land adjoining said highway and alleged damages to the extent of \$15,000.

The city demurred to the declaration, which was sustained by the trial court, and an appeal prosecuted by the plaintiffs.

The material portions of the opinion of the court are as follows: "Appellants contend that the acts set forth in their declaration constitute a taking or damage of private property for public use within the intent and meaning of section 13 of article 2 of the constitution, providing that private property shall not be taken or damaged for public use without just compensation.

"The position of the appellee is, that a necessity existing for the establishment of a smallpox hospital, it was within the police power of the city to locate the same on its own property, and that any loss suffered by the plaintiffs is *damnum absque injuria*, or in contemplation of law the loss sustained by the plaintiffs is compensated by the benefits received thereunder, and that no compensation can be had for the injuries sustained.

“The case at bar presents no taking of private property, neither is there a physical injury. Nor does it fall within that class of cases where, notwithstanding there has been no taking or physical injury together with resulting damages, yet the intrinsic value of the property is lessened by reason of access being interfered with or its accessibility is prevented or impaired. The real injury alleged and for which the plaintiffs seek recovery is the menace to the health of the inhabitants in the vicinity of the hospital, or rather, to those inhabitants who, in the intended future use the plaintiffs’ property, might become residents in the vicinity thereof, and who, by reason of its location, would be deterred from purchasing plaintiff’s property and consequent loss in the speculative value thereof. Neither does it appear from the declaration that the city has been careless or negligent in the maintenance of the hospital, or that by reason of any act of omission or commission on the part of the city it has become a nuisance to any greater extent than is incident to the location and use of such an institution.”

The court then makes reference to the case of *Rigney v. Chicago*, 102 Ill. 64, and quoting from it says:

“There are certain injuries which are necessarily incident to the ownership of property in towns and cities which directly impair the value of private property, for which the law does not, and never has, afforded relief. For instance, the building of a jail, police station or the like will generally cause a depreciation in the value of neighboring property; yet that is clearly a case of *damnum absque injuria*.” And the court cites other cases from other jurisdictions in support of the principle.

“Conceding that the declaration shows special injury to the appellants in excess of that shared by them with the general public, it can only be under this constitutional provision that a recovery could here be maintained. The law is well settled that where a thing not *malum in se* is authorized to be done by a valid act of the legislature, and it is performed with due care and skill, a strict conformity

with the provisions of the act, its performance cannot, by common law, be made the ground of an action, however much one may be injured by it." * * *

"Supposed injuries growing out of the proper exercise of the police power must be considered *damnum absque injuria*, in the theory of the law that the plaintiff is compensated for the injury sustained by sharing in the general benefits which are secured to all by reason thereof." * * *

"Under the express delegation of power by the legislature we cannot hold the application of the property for the use of a smallpox or other hospital is not such an unusual and unreasonable use of property as would take it out of the police power of the city so as to render it liable for such application, when, as here, it is conceded that the pesthouse is rightfully located and well conducted." * * *

"The statute laws of this State conferred upon the mayor and city council plenary power to establish, both within and without the city limits, hospitals and pesthouses for the isolation and treatment of contagious and infectious diseases. The preservation of the public health renders such legislation highly essential and the authority of the General Assembly to enact it is beyond question or controversy. Within the scope of the power thus granted the whole authority of the State is included and delegated, and, therefore, what the State may directly do in furtherance of these objects, the municipality clothed with the delegated power from the State may also lawfully perform though there may be a difference as to the legal consequent upon the exercise of the power by the State directly, and those flowing from the exercise of the same power by the municipality."

And the judgment of the trial court was affirmed.¹⁵

The case of *Chicago v. Spoor*, 190 Ill. 340, was a case brought by Spoor against the city for damages resulting to his property by reason of the construction of a viaduct on Halsted street. Fortieth street, one block north of the

15—*Frazer v. Chicago*, 186 Ill. 480.

property, was occupied by seventeen railroad tracks. These tracks spread out on Fortieth street near the entrance of the Union Stock yards and occupied three hundred and fifty feet of Halsted street. Formerly horse cars ran on Halsted street to Fortieth street and stopped. The passengers had to get off, cross the railroad tracks on foot and transfer to a car on the opposite side.

By a conference between the Union Stock Yards & Transit Co., the City Railway Co. and the city it was agreed that a viaduct should be built over these tracks, without expense to the city. The object of the viaduct was to carry the travel over these tracks on account of the dangers and delays at the crossing. The approach to the viaduct began in front of one of the lots, and rose at about one foot in thirty to the north at the northwest corner of the block; at this point the approach was about nine feet above the natural surface and there was an approach on Forty-first street, adjoining the block, connecting with the approach on Halsted street.

The plaintiff was the owner of lots 25 to 34 in the block fronting on Halsted street, and the action was brought for destroying free and convenient access to and from the premises from the street and cutting off light and air. The defendant filed the general issue and there was a verdict for the plaintiff for \$10,750, and judgment was entered upon the verdict. The Appellate Court affirmed the judgment and an appeal was taken to the Supreme Court. On the trial a number of witnesses were called for the plaintiff and each testified as to the fair cash market value of the premises before the erection of the viaduct and its fair cash market value after its erection. On the direct examination no inquiry was made of either of the witnesses, and nothing was developed, as to the nature of the alleged injury to the property, the elements of damages included or the basis for his judgment. These witnesses were cross-examined by the defendant for the purpose of ascertaining on what basis

they estimated the damage. The most prominent element of damage in the minds of the witnesses was the character of the travel and traffic on Halsted street after the viaduct was built and that fewer people came from the stock yards upon the street, so that less business could be done there. The plaintiff, Spoor, was one of the witnesses, and on cross-examination he stated that before the viaduct was built people came from the stock yards over the tracks at Fortieth street on Halsted street, and that fact brought business to the shops and stores; that people coming from the stock yards a block north of this property could not come on Halsted street so that their trade was lost; that after the viaduct was built there was more travel on Halsted street than before, but it was not of a character to stop there; that instead of the old horse cars that stopped on each side of the tracks, there was a trolley system and the cars ran right through, stopping only at the street crossings; that the blocking of the tracks across Halsted street was a benefit to the property and it was an injury to the property to have through travel; that the advantage to the property resulted not so much from the travel upon the street as the ability of the traffic to stop and get at the place, and the through traffic was a serious damage to the property because the people did not walk on the street but went through on the cars. Another witness testified that the former condition, when the people got off and walked across the tracks, was a benefit to the property; that it took so long for the people to go down town that they patronized their neighbors and left their money there; that working men in the stock yards came out on Fortieth street, a block to the north, and came upon Halsted street and patronized the places there, and that they spent their money and made business there, and business was diverted by turning it in another direction. He attributed the depreciation in value of the property largely to these causes and said the fact of the building of the viaduct killed the business there and taking

that away left the property of little value. The defendant asked the witness to separate the damages resulting from the fact that the people did not walk or stop on the street but went through on trolley cars and the diversion of the traffic that formerly came on Halsted street from the interference with the ingress and egress to and from the lots, and other causes of damages. The witness could not divide up the damages or distinguish between the different causes, and the defendant then moved to strike out the testimony as to the depreciation of the property by reason of the construction of the viaduct, because the estimate included elements of damage for which there could be no recovery, but the motion was overruled. It appears from a statement by the court in ruling on the question that the view of the court was, that while a party could not sue and recover for the loss of profits in business on account of a viaduct, yet if there was an injury to abutting property there could be a recovery for everything that went to make up the market value of the lots, whether it was a diversion of traffic or whatever it might be. This being a suit where access to the property was affected, the court seemed to have held that everything resulting from the improvement which affected unfavorably the utility of the property for business purposes was an element of damage.

The court then refers to the cases of *Rigney v. Chicago*, 102 Ill. 64; *Lake Erie & W. R. R. Co. v. Scott*, 132 Ill. 429; and *Hohmann v. Chicago*, 140 Ill. 226, relying especially on the latter case, and says: "An owner of property has no right that traffic shall go past in horse cars or on foot, or that a city shall not increase the facilities for through travel. Any scheme of rapid transportation would have had the same effect on this property detailed by the witnesses, and the only relation the verdict had to the trolley was that it created facilities for that method of transportation. It was not the right of the plaintiff, as against the city, to have Halsted street maintained in such a way that people com-

ing from the stock yards would find it convenient to come out on Halsted street, so as to make more travel and traffic by the property. As they had no legal right of that kind there was no infringement of any right and there could be no recovery for resulting damages. It is clear that the amounts estimated by the plaintiff's witnesses consisted, in a large part, of damages of that character. As the estimate included damages for injuries to supposed legal rights, which had no existence, the court erred in not striking out the testimony when moved to do so.

"The evidence of damages resulting from the diversion of traffic or change of the method of transportation on the street is not legitimate, for any purpose, and opinions of witnesses based on depreciation from these causes should have been excluded." ¹⁶

The case of *Aldrich v. Metropolitan West Side Elevated Railroad Co.*, 195 Ill. 456, was this: An appeal by the plaintiff below from the judgment of the Circuit Court rendered in bar of her action and for costs. The question presented involved the construction of the first clause of section 13 of article 2 of the constitution. The plaintiff owned two lots fronting west on Ashland Boulevard, in Chicago, and had erected thereon an expensive apartment building. Afterwards the defendant constructed on its right of way, north of the plaintiff's premises, its elevated railway and had operated cars thereon by electricity, crossing Ashland avenue thirty-one feet north of the plaintiff's building. To recover damages to her property caused by the construction and operation of the defendant's road the plaintiff brought the action and as ground for recovery alleged in various counts that by the construction and operation of the road the street is darkened, the light cut off from her house, the view down the boulevard obstructed, and the entrance to the premises interfered with and rendered unsafe; that by reason of the darkening of the boulevard and the run-

16—*Chicago v. Spoor*, 190 Ill. 340.

ning of the trains the premises are deprived of air, ventilation and quiet passage along the boulevard to and from the premises has been impaired and the soil and buildings disturbed, vibrated, shaken and damaged, and trains are operated over the structure with great noise caused by rumbling and squeaking of wheels, and other noises connected with the operation of the elevated railroad, so as to continually disturb and destroy the peace and quiet of the premises; that the appellee is a railroad corporation authorized by the State to take and damage private property necessary for the construction and operation of its road upon making just compensation therefor, and that the plaintiff's property has been damaged by reason of such construction and operation in the sum of \$20,000, but it has made her no compensation as required by the constitution and laws of Illinois. To this declaration the defendant filed a plea of general issue. Upon the trial the court excluded the evidence, and directed the jury to find the defendant not guilty.

"There was no charge or proof that the road was negligently constructed or operated, but only by the construction and operation of the road so near the plaintiff's property and across a public street her property was damaged for public use, within the meaning of the constitution, for which no compensation had been made, and for which she was entitled to recover.

"For the purpose of this case it must be assumed, from the record, that the road was carefully constructed and operated, and that by such construction and operation it did not injuriously affect the property of others, or the property in question of the plaintiff, any more than such property would be affected in any case by the construction and operation of such a road so near to such property. The record showed that no unusual noise or vibration of the plaintiff's property was caused by the company. Access to her property from any public street or alley was not cut off

or injuriously affected. In short, whatever damages were sustained by the plaintiff were such, and only such, as were common to the public generally."

The court then reviews the *Rigney* case, and says: "That case ever since its decision has been regarded as laying down the proper rule on the subject and is, we think, conclusive of the case at bar. Here there has been no direct physical disturbance of any right, public or private, which the plaintiff enjoys in connection with her property which gives it an additional value, whereby she has sustained a special damage in excess of that sustained by the general public. The damages sued for are of the same kind and character as those sustained by the public generally in the ownership of property, which property may have been lessened in value by the construction and operation of the road.

"Noises, the obstruction of light and view, are necessary incidents to the construction and operation of such a road, and if every property owner should recover in all such cases, the making of public improvements would become practically impossible.

"This road was not constructed along the street in front of the plaintiff's property, thus injuring or destroying a public right which she enjoyed in connection with her property, but it was constructed upon its own land or right of way. Therefore, what the right of an abutter would be in such a case it is not necessary to consider. A railroad constructed and operated by authority of law cannot be a nuisance, and there is no right of action at common law for the depreciation in the value of property so caused. Nor can we agree that the constitution of 1870 gives, or was intended to give, a remedy for all incidental losses, or for the depreciation in the value of property, caused by the construction and operation of railroads in the vicinity, but as is said in the *Rigney* case, it was intended to restore a remedy which existed at common law but which had been denied by the constitution of 1848.

“In the case at bar the trains were run by electricity, and it is not contended that there were thrown or deposited on the plaintiff’s property any cinders or other material substance, nor that there was any unusual noise or vibration or jarring of the earth. Whatever damage the plaintiff may have suffered in depreciation in value of the property was of the same kind as that suffered by the public generally, and common to the ownership of property in a large city, where noise, confusion and disturbance of quiet appear to be the necessary results of the activities of city life.

“The proof admitted, and that offered, on the trial of this case would not sustain in full the allegations of the declaration which in some of the counts stated a good cause of action, and what we have said is based upon the record as it stood on the trial of the case as we have stated it to be.”¹⁷

The case of *Barnard v. Chicago*, 270 Ill. 27, was a case where the plaintiff sued the city for damages resulting to his property by reason of the construction of what is known as the LaSalle Street Tunnel, in the City of Chicago. The declaration was in three counts setting forth the damages in various forms; to this declaration the city filed a demurrer which was sustained, and an appeal taken by the plaintiff.

The demurrer raised the question as to the liability of the city for damages to buildings abutting on a street caused by excavating the street for a public improvement and thereby removing the lateral support of the soil. The plaintiff conceded that an action could not have been maintained for such damages under the constitution of 1848. He insists, however, that the right to recover such damages was conferred by the constitution of 1870, which provides by section 13 of article 2, that private property shall not be

¹⁷—*Aldrich v. Metropolitan W. S. E. R. R. Co.*, 195 Ill. 456.

taken or damaged for public use without just compensation. The corresponding provision in the constitution of 1848 was that private property shall not be taken and applied to public use without just compensation, and under that constitution it was held necessary to a recovery of compensation that there should have been a direct physical invasion of the property. Consequently, injuries to property accomplished without physical contact were not compensated.¹⁸

To afford relief in such cases, as was said in the case of *Rigney v. Chicago*, 102 Ill. 64, the makers of the constitution of 1870 inserted the provision just referred to. This provision was intended to afford redress in cases of damages where there was no remedy under the provisions of the constitution of 1848, and accordingly in the *Rigney* case the plaintiff was held entitled to damages for the construction of a street improvement more than two hundred feet distant from his property, on another street, which made his access to the improved street less convenient. It was said: "In all cases, to warrant a recovery, it must appear there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provision on the subject the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie at common law."

Owners of property bordering upon a street, in addition to the public right of travel which they enjoy in connection with all citizens, have certain private rights incidental to

18—*Roberts v. Chicago*, 26 Ill. 249;
Chicago v. Rumsey, 87 Ill. 348.

their ownership of abutting property. Among these is the right of access to and egress from the property by way of the street, and this right cannot now be taken away or materially impaired without compensation to the extent of the damages suffered.¹⁹

Another such right of which the abutting owners may not be deprived without just compensation, is that of having light and air from the public highway, unobstructed by any encroachment upon the street.²⁰

As has been seen, under the constitution of 1848, these rights were not protected from destruction in the making of public improvements. If the body of the property itself was not interfered with, these incorporeal rights might be wholly destroyed. Since the constitution of 1870, any change in a street which has injuriously affected the access to abutting property has given a right of action to the owner for the damage to his property.²¹

So the construction of an elevated railroad in a public street whereby access to the street, the view and the passage of light and air over the street were obstructed—the effect of all of which was to affect the value of the abutting property—gave a cause of action to the owner for damages occasioned by such loss of access, air, light and view.²²

In the case on hearing the plaintiff had a right to the undisputed occupancy and enjoyment of his property and he was deprived of this right. In the absence of any statute he clearly had a right of action against the persons depriving him of this right, for in the absence of statutory authority the construction of the street railway and the tunnel in the street was a public nuisance.²³

19—Chicago v. Union Building Assn., 102 Ill. 379; Illinois M. Iron Co. v. Lincoln Park Coms., 263 Ill. 446.

20—Field v. Barling, 149 Ill. 556.

21—Elgin v. Eaton, 83 Ill. 535; Chapman v. Stunton, 246 Ill. 394; Grant Park v. Trah, 218 Ill. 516;

Shrader v. Cleveland, C. C. & St. L. R. R. Co., 242 Ill. 227.

22—Aldis v. Union Elec. R. R. Co., 203 Ill. 567.

23—Metropolitan C. Ry. Co. v. Chicago, 96 Ill. 620; People v. St. Louis, 5 Gilm. 351.

And for damages occasioned by a public nuisance anyone sustaining special damages different to those common to all may maintain an action.²⁴

To the appellant's action, therefore, the only defense is that the city was authorized by statute to pass the ordinance under which the work was done. Before the adoption of the constitution of 1870 this would have been a complete defense, for acts authorized to be done by a valid act of the legislature, performed with due care and skill, in conformity with the provisions of the act, could not be made the ground of an action, however great the damage done. Since the constitution of 1870, however, the power of the legislature has been restricted and the statute constitutes no defense where property has been damaged for public use.

The right of an abutting owner to the soil of the street for the support of his building does not determine the question of the city's liability. The basis of the appellant's action is the deprivation of his right to the enjoyment of his property free from disturbance. No one could interfere with his premises by digging away the support of his building and defend an action for damages on the ground that the appellant had no right to such support, unless such person could show a legal right to make the excavation. Such authority could be derived only from a statute. No one may rightfully interfere with the use of abutting property by making changes in the street, whether by altering the grade, erecting structures or making excavations, except when acting under the authority of an act of the legislature. Such an act confers the right to make the changes in the street, but since the constitution of 1870 compensation is required for damages.²⁵

And as was said in the Rigney case that under this constitutional provision a recovery can be had in all cases where

24—Wylie v. Elwood, 134 Ill. 281.

25—Chicago & W. I. R. R. Co. v. Ayres, 106 Ill. 511.

private property has sustained a substantial damage by making and using an improvement that is public in its character; that it does not require that the damage shall be caused by a trespass or an actual invasion of the owner's real estate, but if the construction and operation of a railroad or other improvement is the cause of the damage, though consequential, the party damaged may recover.

The doctrine of the Rigney case has not been modified, limited, extended or departed from in any degree.²⁶

That doctrine, it is there said, is, that it was intended by the constitution to afford a remedy for damages resulting from an act done with legislative authority where, in the absence of such authority, there would have been a right of action at common law. In that case the premises of the owner were depreciated in value by the erection of the railroad, but there would have been no cause of action at the common law. The railroad company was upon its own right of way, and was under no obligation, by contract or otherwise, to maintain a switch connection. It needed no statutory authority for the elevation or depression of its tracks, and if it destroyed the switch connection with the plaintiff's property it had violated no right of the plaintiff. In the present case, in the absence of statutory authority to construct the tunnel in the street, there would have been a right of action for damages to the appellant's building. The effect of the constitutional provision, under the decision in the Rigney case, is to take away the protection of the legislative authority.²⁷

§ 1886. Illegal or Irregular Proceedings on the Part of the Municipality no Defense Thereto—In a suit against the City of Chicago for damages resulting to private property by reason of the construction of a viaduct in one of the principal streets of the city, it was urged as a defense that the city was not liable, because the order under which

26—*Otis Elevator Co. v. Chicago*, 263 Ill. 419.

27—*Barnard v. Chicago*, 270 Ill. 27.

the viaduct was built was void, and therefore there was no liability on the part of the city. The argument was based upon the proposition that a viaduct could only be legally constructed in pursuance of an ordinance, and as it was constructed simply under an order of the city council the city is not liable. The improvement was not beyond the authority of the city, and where there is power to pass an ordinance or undertaking an improvement, any irregularity or defective exercise of the power is no protection to the city. It is immaterial whether the city proceeded regularly or irregularly in the exercise of its power.²⁸

§ 1887. Indemnifying Municipality Against Damages Resulting from the Vacation of Streets and Alleys—When the ordinance requires that the adjoining owners shall pay a certain sum of money, within a certain time, “toward a fund for the payment of any and all damages which may arise from the vacation of said” street or alley, it is the duty of the municipality to retain the indemnity for the period of the running of the statute of limitations, until there is no longer any possibility of any person claiming damages by such vacation, and thereafter repay the money advanced it, and a promise to do so will be implied. And the party paying the money may maintain an action to recover the same.

To give an ordinance of vacation, which is to go into effect on the payment of a certain sum of money by certain parties, the construction that it is a grant or conveyance by the municipality to the party paying the money for the vacation of the street or alley, and that the payment was the consideration for the grant would require that the ordinance did not mean what its language imported, that the street or alley was no longer needed for public use, which was lawful, but that it meant something else and entirely different. The legislative power of a municipality must be exercised for the public benefit, but that does not authorize

28—Chicago v. Spoor, 190 Ill. 340.

the municipality to sell or bargain legislation as a means of obtaining revenue. It would be a novel proposition that a municipality, as a condition precedent to the exercise of its lawful power and authority to vacate a street or alley, no longer needed for public use, could demand and receive from private parties a sum of money for its action. Such a holding would be dangerous in principle, contrary to good morals and against public policy.²⁹

§ 1888. Proceedings by Municipalities to Ascertain Damages Done to Private Property by Public Improvements—

The case of *Meyer v. Teutopolis*, 131 Ill. 552, was a proceeding filed by the village to ascertain the damages resulting to private property by reason of the vacating a portion of a certain street. Various property owners, including Meyer, were duly served with summons, and appeared and duly entered their motion to dismiss the proceeding, alleging, among other things, that the street had been vacated at the instance and for the benefit of St. Joseph College, a private corporation located in said village; evidence was introduced to sustain the motion, but it was overruled by the court. Thereupon a trial was had upon the merits and the defendant offered the same evidence as was introduced on the hearing of the motion, but it was excluded by the court; doubtless on the principle that the motive by which legislative bodies are actuated are immaterial and cannot be inquired into.

Without a judicial determination, a municipal corporation, under the power conferred by its charter, to "locate and establish streets and alleys, and to vacate the same," may constitutionally order the vacation of a street, and this power, when exercised with due regard to individual rights, will not be restrained at the instance of a property owner, claiming that he is interested in keeping open the street dedicated to the public.

²⁹—*Lockwood & S. Co. v. Chicago*,
279 Ill. 445.

Private rights, it is true, may be affected by the vacation of a street, and where that is the case, common justice would seem to dictate that compensation should be made to the parties injured; and it may, perhaps, be held that such compensation is required by the provisions of the constitution. But whatever may be the source from which the right to damages springs, such right is fully protected by the provisions of Chapter 145, R. S.

The damages to private property occasioned by the vacation were duly assessed by the jury, judgment given and the proceedings sustained by the Supreme Court.³⁰

§ 1889. Chancery Jurisdiction to Enjoin the Vacation of Streets—The Union Building Association filed a bill against the City of Chicago alleging that it was a property owner and taxpayer in the city and the owner of the building on the southwest corner of Washington and La Salle streets in the city, fronting 100 feet on La Salle street. The object of the bill was to enjoin the execution of an ordinance passed by the city council, vacating a portion of La Salle street located between Jackson and Van Buren streets, located about four blocks from the property of the complainant.

It was averred in the bill that if the street should be vacated it would suffer great damage to its property, which it was unable to establish with accuracy, and that there was no provision at law by which the damages could be ascertained; that unless the city was restrained it would tear up the bed of that part of the street attempted to be vacated, and cause it to become impassable as a thoroughfare, and that the complainant would be prejudiced if an injunction was not issued immediately and without notice. The bill prayed for an injunction against the city restraining it from proceeding to execute its order for the vacation of that part of the street mentioned. It may be stated here that the solicitors for the complainant were Mr. F. H. Kales

30—Meyer v. Teutopolis, 131 Ill. 552; Smith v. McDowell, 148 Ill. 51.

and Mr. M. W. Fuller, late Chief Justice of the Supreme Court of the United States, two very able lawyers, then residing in the City of Chicago.

Instead of demurring to the bill the city answered, but alleged that "If it is so liable there is an ample remedy at law." A *pro forma* decree was entered, granting the relief prayed for by the complainant and declaring the ordinance of vacation illegal and void, and from this decree an appeal was taken to the Appellate Court, which affirmed the decree of the trial court, and an appeal was prosecuted to the Supreme Court by the city. That court says:

"We are of the opinion that the appellee has shown no such special or particular injury to its property as entitles it to an injunction, even if it be contended that the proposed vacation and closing up a part of La Salle street is illegal." * * * "It is not, nor could it reasonably be, that the closing up of this portion of the street in any degree interferes with access to appellee's lot, or with its use and enjoyment. The streets adjacent to it all remain in the same condition as to width and character of improvements that they were before, and it is not pointed out how the appellee will be otherwise specially or particularly injured by the proposed closing up of the portion of the street in question.

"All persons having to pass the appellee's property to Van Buren street, or to the depot of the Chicago, Rock Island & Pacific and the Lake Shore and Michigan Southern railroads, will, if the proposed vacation be effected, have to go a little farther than otherwise, and this would be, so far as concerns the appellee, the only proximate effect of a permanent illegal obstruction placed in that part of La Salle street proposed to be vacated. They may, to accomplish their journey, have to make an additional turn, and travel a little farther. Is this such an injury as authorizes a private party (one who has no authority, by statute or

otherwise, to represent the public), to have the aid of a court of equity?"

"We regard it as a rule well settled that to any obstruction to streets not resulting in injuries to the individual, the public only can complain. Where, however, the obstruction is such that a public prosecution is authorized, and, at the same time an individual has been specially injured thereby, as well as where the act has been private and an offense against the individual solely, he may maintain an action and recover for his special damages; but in such case a special injury is the *gist* of the action, and unless it is alleged and proved, there can be no recovery."

* * *

"Counsel, however, contend that the principal is well established that powers conferred upon public officers in relation to corporate property, are trusts, and that they hold the property in trust, and that a court of chancery, therefore, has jurisdiction to prevent the city council from vacating the street, as an inducement for the Board of Trade to remove its place of business, on the application of any taxpayer of the city, and a large number of authorities are cited in support of the proposition. But the court held that they were not applicable." * * *

"In no case has it ever been held that a private individual may maintain a bill to enjoin the breach of a public trust (in the absence of statutory authority), without showing that he will be specially injured thereby." And the decrees of the Appellate and Circuit courts were reversed.³¹

While it is not stated in broad terms that a court of chancery is without jurisdiction in such a case, because of an adequate remedy at law, it is clearly to be so inferred.

The case of *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158, was a bill in chancery, filed by Inez L. Parker to enjoin the execution by the Catholic Bishop of Chicago of

31—*Chicago v. Union Build. Assn.*,
102 Ill. 379.

an ordinance vacating an alley passed by the city council of Chicago, on the ground that it was not lawfully passed by the city council, and it did not provide for ascertaining and paying the damages accruing to the plaintiff's property by reason of such vacation, as provided by Sec. 1, Ch. 145, R. S.

A general demurrer was filed to the bill, which on being sustained, the complainant took an appeal.

In regard to the passage of the ordinance it is alleged that the ordinance was passed in a batch of ten or more, and without consideration of the council; it was not shown that any such facts appear by the record of the city council or that the ordinance did not receive the necessary number of votes of all the aldermen of the city to make it legal, and there was no allegation of fraud in the passage of the ordinance, and on this point it was held that the demurrer to the bill was properly sustained.

It was insisted, however, that although no portion of the complainant's property was physically taken, by section 1, Chapter 145, of the Revised Statutes, the city council was required to ascertain and pay to the complainant the damages to her property resulting from the vacation of the alley, and not having done so, the ordinance was void. The latter clause of that section reads as follows: "And when property is damaged by the vacation or closing of any street or alley, the same shall be ascertained and paid as provided by law."

It was urged that the latter clause requires, as a condition to the vacation or closing of a street or alley, that damages be ascertained and paid. It cannot be, however, that the legislature intended that in all cases there should be a judicial determination as to whether all property lying adjacent to, or that might be in a remote degree affected by the closing of a street or alley, was damaged or not. It is only "when property is damaged by the vacation of a street or alley," that the same is to be ascer-

tained as provided by law. It is apparent that a discretion is vested in the municipal authorities to determine, in the first instance, whether property will or will not be damaged by the proposed vacation or closing of a street or alley. If they, in the exercise of a reasonable discretion, find that property will be specially damaged by the proposed vacation or closing, they should proceed to ascertain and pay the same as was done in *Meyer v. Teutopolis*, 131 Ill. 552. If, on the other hand, they determine that no injury will inure to the property by their proposed action, they may, by ordinance passed in conformity with the statute, vacate or close such street or alley. Any other construction of the statute would require the municipality to summon into court every person whose property, however remote, might be injured by the proposed vacation and would render the ordinance void, if the contention of the complainant be correct, if it should afterwards turn out that a single owner whose property had been damaged had been omitted. The presumption is, that the city council, being clothed with governmental functions, will discharge its duty as required by law, and where property is damaged by the proposed vacation or closing of a street or alley of the city, they will ascertain and pay damages as required and this presumption will obtain until the property owner has, in an appropriate action, established his right to damages, and the property owner will, when no proceedings have been instituted by the municipality to ascertain his damages, be remitted to his remedy at law for the recovery of the same.

The determination of the city authorities cannot, however, be conclusive upon the property owner. He will be entitled to his day in court, to recover, in an appropriate action at law, all such special damages to his property, as contradistinguished from the damages he suffers in common with the public, as will be occasioned by the proposed vacation. Such special injury or damage differing in kind

from those affecting the general public are the gist of the right of private action, and to give the complainant any standing, either in equity or at law, must be alleged and shown.³²

It is quite clear from the foregoing that the principal reason for sustaining the demurrer on this point is that the complainant had an adequate remedy at law, and therefore could not maintain a bill in equity.

§ 1890. Chancery Jurisdiction Invoked by Public Officers to Prevent Prepresture—The case of *Smith v. McDowell*, 148 Ill. 51, was a bill in chancery filed by McDowell, as State's Attorney, on the relation of certain citizens and electors of the village of Chatsworth, on their own behalf as well as the general public, to restrain the construction of a prepresture, consisting of an areaway, and stairs therein, on one of the principal streets of the village. It was alleged that the ground included within the village had been duly platted by the owner thereof into streets and alleys and public grounds as the town of Chatsworth, and the same was duly recorded; that said town afterwards became incorporated under the general law as a village; that by virtue of said plat, and the terms of dedication in the acknowledgment thereto, and the recording thereof all of said streets became dedicated for the use of the public, and have ever since been so used; that in said village is a public street named Fourth street on said plat; that the president and board of trustees of said village have undertaken by ordinance to dispose of a portion of said street for private purposes and use; the ordinance substantially provided that to enable the owner of certain premises in the village to erect and maintain a brick building on the same with an area and entrance way to the basement of such building on Fourth street; that the part of said street beginning at the southwest corner of the lot extending five

32—*Parker v. Catholic Bishop of Chicago*, 146 Ill. 158.

feet west and north eighty-five feet be vacated; it was further alleged in the bill that the premises, of which Smith was the owner, were located on the corner of Fourth and Locust streets, two of the principal thoroughfares in the village, and the sole purpose and object of the said ordinance was to give to said Smith the five by eighty-five feet vacated, for an area and stairway in connection with the basement of his building, and that to permit the construction of such area and stairway in said street would create a preposterous therein and a permanent obstruction thereof; that it will be a public nuisance, and deprive the public of that portion of the street given to Smith. The bill made Smith and the village parties defendant, prays that the ordinance be declared void, and that Smith has acquired no rights thereunder, and if any excavation or area has already been made that the same be declared a nuisance and abated accordingly; prays an injunction restraining Smith from excavating in said street and from constructing and maintaining the area and stairway and from using said street for private purposes.

A temporary injunction was issued, and on a hearing the court entered a decree finding the ordinance void and awarding a perpetual injunction. Smith appealed.

The important question presented to the court was whether the municipal authorities, under the statutes giving them the control of the streets and alleys have the power to vacate a street or a portion thereof, for the benefit and use of a private person. It was sought to invoke the doctrine that the motives of the municipal authorities in the passage of the ordinance cannot be judicially inquired into. That position was at once conceded, and whether their motive in vacating the portion of the street was honest or otherwise is not a subject of inquiry. But the purpose accomplished by the ordinance—the object attained—may always be considered, indeed, must be, in determining the validity of the ordinance. If the pur-

pose affected by the ordinance is within the power of the municipal authorities, their act will be valid. The question to be determined is one of power of the municipality, and in the determination of which, the legal effect of the act of the municipality becomes the controlling matter for consideration.

If the result is one requiring the exercise of a power which is not conferred upon or existing in the municipality, the ordinance should be declared void. It is insisted that under the statute—Clause 7, par. 63, ch. 24, R. S.—the grant of power to municipalities to lay out and establish streets, “and to vacate the same” that the power to vacate is absolute and to be exercised at the discretion of the municipal authorities. The court could not concur in this view. By the platting of the village the streets in their entire width and length were dedicated to the use of the public as streets. The village thereby became seized in fee of the streets and alleys for the use of the general and local public, holding them in trust for such uses and purposes, and none other. These municipal corporations are instrumentalities of the state, exercising such powers as are conferred upon them in the government of the municipality. Their powers are measured by the legislative grant, and they can exercise such powers only as are expressly granted, or necessarily implied from the powers expressly granted.

It does not follow, as seems to be supposed that by the use of the general words, “and vacate the same,” the absolute power of the legislature was intended to be conferred upon the municipal authorities. The grant of power in this particular is to be construed in view of the purpose for which the municipality is invested with the control of streets, alleys and public grounds. The municipality, in respect to its streets, is a trustee for the general public, and holds them for the use for which they were dedicated. The fundamental idea of a street is, not only

that it is public, but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it. Whatever title to these public grounds may be vested in the municipal authorities, they have not the unqualified control and disposition of them. They are dedicated to the public for a particular purpose, and only for such purpose can they be rightfully used. For these purposes the city may use and control them, and adopt all needful rules and regulations for their management and use, but she cannot alien or otherwise dispose of them. At most she but holds them in trust for the benefit of the general public. Holding them in trust for the public, and having no authority to convey or divert them to other uses, it would seem inevitably to follow that they can have no power to grant to individuals rights or easements in the streets which might in any way interfere with the duty of preparing them for public use. And it follows necessarily that the "to vacate the same" is to be exercised only by the municipal authorities in the exercise of their discretion that the street is no longer required for public use.

In this case there is no pretense that the public interest required the vacation of any part of the street, or that any public interest, local or general, would be subserved by the proposed vacation. The ordinance professedly and in terms, proposed to destroy the public right and use, for the sole purpose of enabling a private person to occupy a portion of the street with a permanent structure, appurtenant to his building abutting upon the street. This the municipal authorities are not empowered to do, and their action was *ultra vires* and void.³³

³³—Smith v. McDowell, 148 Ill.
51.

CHAPTER XIX

MORTGAGES

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§ 1900. **Introduction**—Were it not for the fact that the subject of mortgages is treated and considered by the Statutes of Illinois this chapter would not be included herein. The subject of mortgages is so extensive that a full and complete treatment of the subject demands a special treatise thereon, and there are now extant a number of excellent works fully covering the subject, which naturally renders another work thereon unnecessary. But the statutes of Illinois have given a chapter to the subject, and as this work purports to be one treating of the statute law of real estate in Illinois, disregarding this chapter would render the work incomplete. Therefore, insofar as the statutes and decisions of the courts relate to this subject, they will be considered herein.

§ 1901. **Mortgages Defined**—A mortgage is a conveyance with a condition annexed, and purports upon its face to convey a title, but the condition authorizes the mortgagor to defeat the title thus conveyed and to reinvest it in himself, by the performance of the condition. After a failure to perform the condition, the title at law apparently becomes absolute in the mortgagee and is clear color of title. But the possession acquired by the mortgagee and so long as it continues, is not held to be hostile or adverse. So also in regard to the payment of taxes. While these several relations exist, the possession and the payment of taxes cannot be held to be for the benefit of the occupant, and cannot be relied upon for hostile purposes against the mortgagor.¹

1—Chickering v. Falles, 26 Ill. 508.

A mortgage is any conveyance of an estate to secure a debt, or the performance of some act, such as the payment of money, or the furnishing of indemnity, subject to be defeated by the performance of the act agreed to be done. So a conveyance made by a land company to a trustee given to secure the performance of the undertakings of the land company to pay the dividends or interest semi-annually to the guaranteed or preferred stock, and ultimately to pay the stock itself, made such a conveyance a mortgage.²

§ 1902. General Rules of Conveyances Applicable to Mortgages—A mortgage is a legal conveyance of the title to land, and the rules of law in regard to the parties, the description of the premises, the covenants, the signing, sealing, acknowledgment, delivery and recording of mortgages are substantially the same as those applying to conveyances in general, and these subjects having all been considered in the chapter on conveyances, they will be but slightly considered here.

§ 1903. Nature of Mortgage Estate—In courts of law in this State, the legal title to mortgaged lands rests in the mortgagee. So that, at least after condition broken, ejectment may be maintained by the mortgagee against the mortgagor, or against any person to whom he has conveyed the equity of redemption. The mortgagor can invest his grantee with no greater title than he himself possessed. His grantee merely succeeds to the rights of the grantor, or mortgagor. This is the view which courts of law take when questions arise between the mortgagor or his assigns and the mortgagee.³

But as between the mortgagor or his representatives and parties, other than the mortgagee, the mortgagor is regarded as the legal owner of the property, and has the legal right to protect the property. The legal title is never out of the mortgagor, except as between him and the mortgagee. And as to the mortgagee, if his debt becomes

2—Fitch v. Wetherbee, 110 Ill. 475.

3—Walker v. Warner, 179 Ill. 16.

barred by the statute of limitations, the mortgagor's title is free from the title of the mortgagee, and the mortgagor remains the absolute owner of the property, not by any new title, but by virtue of the title he originally had.⁴

From an early period courts of equity have taken a different view of mortgages than have courts of law. They have looked upon a forfeiture of an estate at law, because of nonpayment on the day fixed by the mortgage, as in the nature of a penalty, and have given relief accordingly. This relief was given by allowing the mortgagor to redeem the land, on equitable terms, at any time before the right to do so was barred by foreclosure, and this right was called his "Equity of Redemption." Courts of equity look upon the substance of the transaction, rather than its form, and have held that the mortgage was a mere security for the payment of the debt, and that the mortgagor was the real beneficial owner of the land, subject to the lien of the indebtedness, and have held also that the interest of the mortgagee in the land was simply a lien upon it, rather than estate in it.⁵

§ 1904. Instrument a Mortgage as to Both Parties—If the instrument be a mortgage as to one party, it must be a mortgage as to the other party; it cannot be a mortgage on one side only; the rights of the parties are mutual and reciprocal, and the rights, powers and obligations of the parties are such as usually appertain to mortgages.⁶

§ 1905. Estate of Executor of Mortgagor in the Mortgaged Lands—Where mortgaged lands are devised to an executor or trustee he acquires no greater title than that held by his decedent and that is merely an equity of redemption. All that an executor can properly inventory is his right or interest in the land and that is an equity of redemption. When the holder of the indebtedness seeks to

4—*Lightcap v. Bradley*, 186 Ill. 510; *Kelley Brewing Co. v. Mason*, 116 Ill. App. 603.

5—*Esker v. Heffernan*, 159 Ill. 38.

6—*Walker v. Warner*, 179 Ill. 16; *Carpenter v. Plegge*, 192 Ill. 82; *Fitch v. Miller*, 200 Ill. 170.

foreclose the trust deed or mortgage and have a decree of sale he is not participating in inventoried assets of the deceased mortgagor but is endeavoring to enforce his claim against an estate before then conveyed by the mortgagor and an estate which an executor or administrator has no right to inventory. The equity of redemption is an estate, which, by the terms of the instrument itself, had been forfeited to the greater estate.⁷

§ 1906. Rights of Mortgagee Fixed by Mortgage—The rights of a mortgagee, whatever they may be, after they become vested in him cannot in any way be affected by any act of the mortgagor or those claiming under him, by way of conveyance, release or otherwise, except by reason of his own negligence.⁸

Where the holder of a mortgage has caused it to be duly recorded he is not charged with notice of other instruments subsequently recorded.⁹

In trust deeds in the nature of mortgages it is not a fatal defect that the holder of the indebtedness is made the trustee therein. But it is more prudent that some other person should be named as trustee.¹⁰

§ 1907. Waste on Mortgaged Premises Prevented by Injunction—A court of chancery will always, on the application of the mortgagee, stay the commission of waste by an injunction. And it makes no difference whether the mortgagor is solvent or insolvent. And the removal of fixtures from the mortgaged premises may be prevented by injunction, inasmuch as such removal would impair the mortgage security.¹¹

A trustee in an active trust, who holds the title in fee, has no right to commit waste on the premises for the bene-

7—*Waughop v. Bartlett*, 165 Ill. 124.

8—*McCauley v. Coe*, 150 Ill. 311.

9—*Waughop v. Bartlett*, 165 Ill. 124.

10—*Foster v. Latham*, 21 Ill. App. 165.

11—*Williams v. Chicago Exhibition Co.*, 188 Ill. 19.

fit of the life tenant at the expense of the remainderman, where he holds the title for the benefit of both.¹²

§ 1908. Platting of Mortgaged Premises by Mortgagor—It frequently occurs that after the execution of a mortgage the mortgagor subdivides and plats the property, and makes a record thereof. This is doubtless done to facilitate the sale of the property. But it cannot be doubted that the mortgagor cannot, without the assent of the mortgagee, plat the mortgaged premises, and donate streets, alleys and public grounds to the public; but, in case such a plat is made by the mortgagor, the assent of the mortgagee thereto will be implied by his accepting a certain sum per lot and executing releases therefor.

And a purchaser of a part of the mortgaged premises, purchasing by the plat, and junior judgment creditors with lien upon portions of the platted premises, are estopped from insisting that the portions of the mortgaged premises embraced in the platted streets, alleys and ways shall be regarded and treated as premises released, and the value thereof credited upon the mortgage debt.¹³

§ 1909. Consideration for Mortgage—It is essential to the validity of a mortgage that there should be a good consideration therefor. What is and what is not a good consideration for a mortgage is frequently a matter of controversy. Where advancements are made by the mortgagee to third parties at the request of the mortgagor, and with his knowledge, such advances are a sufficient consideration to support the mortgage. It is not necessary that the money should pass through the hands of the mortgagor.¹⁴

It has always been held that a pre-existing debt is a good consideration for a conveyance by way of mortgage.¹⁵

The fact that the mortgagor is not indebted to the mortgagee and the fact that no consideration passed from him to the mortgagor does not always impair the validity of

12—Ohio Oil Co. v. Daughetee, 240 Ill. 361.

13—Boone v. Clark, 129 Ill. 466.

14—Ball v. Marake, 303 Ill. 31.

15—First Nat. Bank v. Davis, 146 Ill. App. 462.

the mortgage. So where it is made to appear that the mortgagor is indebted to certain parties, and expects further advances to be made to him, and he executes a mortgage to a third party for the purpose of securing such indebtedness and future advances, there is no rule of law which is violated by the transaction taking this form, and its validity cannot be questioned. The mortgagee stands in the condition of trustee for the beneficiaries.¹⁶

It is not necessary that the consideration for a mortgage should move directly from the mortgagee to the mortgagor, but a mortgage will be good which is made to secure the indebtedness of a third party.¹⁷

§ 1910. Rights of Innocent Mortgagees—The rights of an innocent mortgagee in the premises will be protected in a court of equity. So, where the defendant in possession of the premises relies upon an unrecorded deed from the mortgagor, executed prior to the making of the loan, and the evidence shows that the loan was negotiated by him, or with his assistance, knowledge and consent and the mortgage given to secure it was recognized by him as a valid mortgage for a number of years after it was executed and recorded, and after the execution of the title was recognized by him as being in the mortgagor, this, under well settled equity principles, will justify the court in properly holding the lien of the mortgage to be superior to the title of the defendant to the premises.¹⁸

Open and visible possession of land by the equitable owner is notice to all persons of the rights of such equitable owner, and charges a subsequent mortgagee with notice of such rights and he takes subject thereto.¹⁹

§ 1911. The Existence of a Debt Essential to the Validity of a Mortgage—In order to constitute the relation of mortgagor and mortgagee, a debt or an obligation of some char-

16—*McIntire v. Yates*, 104 Ill. 491.

17—*Thackaberry v. Johnson*, 228 Ill. 149.

18—*Piot v. Davis*, 241 Ill. 434.

19—*Williams v. Spitzer*, 203 Ill. 505.

acter is essential and where no debt or obligation exists there cannot be a mortgage.²⁰

A mortgage is made to secure the payment of a debt, and where there is no debt there is no mortgage. Although documents may be made in the form of notes and mortgages, and the same placed on record, the mortgage cannot take effect until some advances are made on the notes secured by the mortgage.²¹

Where the note which the mortgage purports to secure is not in existence at the time the mortgage is executed, but was executed several years after the execution of the mortgage, and after the rights of third parties had intervened, it cannot be foreclosed so as to effect the rights of such third parties. And this is true even though the indebtedness existed at the time of the execution of the mortgage.

But it is not doubted, however, that a mortgage may be drawn to secure an indebtedness without any note or other obligation being given as evidence of such indebtedness.²²

While there must be a debt intended to be secured by a mortgage in order to render a mortgage valid, there need not be any promise on the part of the mortgagor to pay the debt. It is not essential to the validity of a mortgage that the obligation to pay the debt should be direct from the mortgagor to the mortgagee.²³

While it may be true that as between the parties to the transaction it might be their understanding that a mortgage should take effect from and relate back to its date, and such an understanding might be enforced by the courts, yet as between third parties the intention of the parties to the transaction must yield to the requirements of the law in regard to the payment of the money and recording the instrument.²⁴

20—*Freer v. Lake*, 115 Ill. 662;
Fischer v. Touhy, 186 Ill. 143.

21—*Schaeppi v. Glade*, 195 Ill. 62;
Schultze v. Houfes, 96 Ill. 335.

22—*Ogden v. Ogden*, 180 Ill. 543.

23—*Evans v. Holman*, 244 Ill. 596.

24—*Schultze v. Houfes*, 96 Ill. 335.

§ 1912. Railroad Mortgages—After Acquired Property—

A railroad company, in addition to the property owned by it, may properly include in a mortgage its after acquired property appertaining to the road, and a mortgage so given, on its foreclosure, and a deed properly executed in pursuance thereof, will convey such after acquired property.

And such a mortgage operates upon the after acquired property as soon as it is obtained. Such is the settled law of the Federal courts, and generally of the State courts as well.²⁵

A mortgage by a railroad company of its present property and such other property as may afterward be acquired by it for railroad purposes does not include a title to an undivided half of a certain piece of property afterwards acquired by it, but not for railroad purposes, and a foreclosure of such mortgage, and a title made thereunder, does not affect the title to such after acquired property. The title remains as it was before the foreclosure.²⁶

§ 1913. Form of Obligation Secured—There is no distinction between notes made payable to a particular person and notes payable to bearer or to the order of the maker and by him endorsed.²⁷

Such a note endorsed and delivered to the holder of a trust deed made to secure the payment of the same, passes the legal title to the note to the holder thereof for value.²⁸

§ 1914. Negotiability of Securities—The negotiability of a promissory note is not destroyed by the mere fact that it is recited in it that its payment is secured by a mortgage or trust deed. In order to destroy such negotiability there must be something in it which qualifies the promise or makes it uncertain or conditional.²⁹

25—Quincy v. Chicago, B. & Q. R. R. Co., 94 Ill. 357; Frost v. Galesburg, E. & E. R. R. Co., 167 Ill. 161.

26—Chicago, P. & St. L. Ry. Co. v. Tice, 232 Ill. 232.

27—McCormick v. Bueler, 67 Ill. App. 73.

28—McAniff v. Reuter, 61 Ill. App. 32.

29—Zollman v. Jackson T. & S. Bank, 238 Ill. 290.

§ 1915. Obligations Payable in Gold Coin—A contract payable in the gold coin of the United States of the standard weight and fineness is valid and one which will be enforced by the courts. The validity of such contracts has been sustained by the State courts and by the Supreme court of the United States. No principle of public policy is violated by such a contract, nor does it violate any principle of law. If the two contracting parties see proper to make the debt payable in gold coin, no reason is perceived why they may not do so. Nor is there any good reason why such a contract may not be enforced, although silver dollars and legal tender notes may be in circulation as money.³⁰

A claim that the mortgage is invalid because it calls for the payment of the mortgage debt in gold coin cannot be considered on appeal from a foreclosure proceeding, where the decree only finds the amount due in dollars and cents without its payment in any kind of money. A clause in a mortgage requiring the payment of the mortgage debt in gold coin, even though it be assumed to be void, would not relieve the mortgagor from his obligation to pay the amount of the debt in some kind of money.³¹

§ 1916. Rents, Issues and Profits Subject to Mortgage—If the mortgage or trust deed includes the rents, issue and profits of the premises conveyed thereby as security for the payment of the debt they become as much a part of the security as the land and the improvements thereon; and if the provision is that the right to collect them shall continue during the period of redemption, then if a receiver is appointed such appointment deprives the mortgagor from the right to collect the rents during that period, until the mortgage debt is extinguished or the property redeemed.³²

§ 1917. Growing Crops Subject to Mortgage—The rule is, that the crops growing upon mortgaged lands are covered by the mortgage, whether planted before or after its ex-

30—Dorr v. Hunter, 183 Ill. 432.

32—Howard v. Burns, 201 Ill. App.

31—Rea v. Homestead L. & G. Co., 579.

178 Ill. 369.

ecution, and until they are severed the mortgage attaches as well to the crops as to the land. And if the land is sold for condition broken before severance, the purchaser at such sale is entitled to the growing crops, not only as against the mortgagor, but as against all persons claiming through or under him subsequent to the recording of the mortgage. But until foreclosure or possession taken by the mortgagee for breach of condition, the mortgagor is entitled to the crops. The mortgagor, however, in possession before condition broken cannot by sale or mortgage, convey to the purchaser, or mortgagee, a better title and a greater right to the growing crops than the mortgagor has; and the mortgagee of growing crops can take no better title than the mortgagor himself has. In order to entitle a purchaser or mortgagee of the crops growing on mortgaged lands to a better title than the mortgagee of the land there must be a severance of the crop from the land before the foreclosure of the land mortgage or taking possession by such mortgagee; and the original mortgagor cannot defeat the right of the foreclosure purchaser to the crop by selling it, without cutting, before the foreclosure, nor by giving a chattel mortgage on it.

While it may be true that as between the parties to a judgment the levy and sale of the growing crops may operate as a severance of the crop from the realty, yet as to a mortgagee in a mortgage, or the trustee in a deed of trust, given by the execution debtor before the execution became a lien such seizure and sale will not work as severance of the crop and that the purchaser at the sheriff's sale takes subject to the rights of the mortgagee, or grantee in the deed of trust, which will not be cut off or affected by the execution sale.

So, if there be no severance of the crop before the appointment of a receiver in a foreclosure of the mortgage, he has the better title.³³

33—John Hancock M. L. I. Co. v. Watson, 200 Ill. App. 315.

§ 1918. Mortgage of Leaseholds—No doubt a term for years may be mortgaged by the lessee, and the lien thus created is co-extensive with the term and becomes extinguished by the mere lapse of time whenever the term ends.

When a mortgage is made upon a leasehold, the mortgagee acquires a lien upon the legal and equitable interest of the lessee at the time the mortgage is executed, but he acquires no interest superior to that of the lessee. The equity to which his lien attaches is subject in his hands to the same contingencies and is liable to be extinguished in the same manner that they would have been if they had remained on the hands of the lessee unincumbered.³⁴

§ 1919. Proper Execution of Mortgage Determined by Laws of Illinois—The question of the proper execution of a mortgage on real estate located in Illinois is to be tested by the laws of Illinois and not by the laws of the state of the mortgagor's residence. So a wife living in Texas can not interpose the laws of Texas, the place of her domicile, as to her capacity to execute the mortgage, or imperfections in the acknowledgment thereof.³⁵

§ 1920. Equitable and Constructive Mortgages—If a grantee in fact buys the land from the complainant and agrees with him to execute and deliver back a mortgage to secure the unpaid purchase money, then as against the grantee a court of equity will properly treat that as done which was agreed to be done and render a decree subjecting the premises to the payment of the amount yet remaining due and unpaid.³⁶

Where a purchaser of land after having paid the purchase money so as to entitle himself to a deed orally pledges the title then in the hands of a third party to his vendor to indemnify the latter against loss as such surety of the vendee in another transaction, a decree ordering the premise to be

34—*McCauley v. Coe*, 150 Ill. 311.

36—*Lohmeyer v. Durbin*, 206 Ill.

35—*Post v. First National Bank*, 574.

38 Ill. App. 259.

sold to indemnify the surety is not erroneous as to the vendee.

Such an agreement is not prohibited by the second section of the Statute of Frauds. The legal title was not in the vendee, and the agreement was not to sell the property, but only to permit the title to remain where it was at the time until the surety should be released.

Neither is the agreement within those condemned by the ninth section of the statute. That section was intended to prevent persons holding the title to lands from creating a trust appointing a trustee, and declaring who shall be the beneficiary and declaring the terms of the trust in any other manner than in writing. It was not intended to prevent the holder of the legal title from agreeing with the holder of the equitable title upon other terms than those by which the equitable owner was originally entitled to have a conveyance of the legal title. The statute was not intended to prevent the parties thus situated to agree upon other and different terms from those contained in the original agreement.³⁷

After a decree for the foreclosure of a mortgage and a sale thereunder at which the mortgagee became the purchaser and the latter on the application of the mortgagor to redeem waived the payment of the money in redemption, and, before the time of redemption expired, agreed with the mortgagor to extend the payment of the money, but still to hold the land as security, and for that purpose took a quit claim deed from the mortgagor, and gave the mortgagor a bond for a re-conveyance of the land upon the payment at certain times, evidenced by promissory notes signed by the mortgagor, in terms payable beyond the statutory time for redemption, for the amount agreed upon, it was held that the quit claim deed and the bond to reconvey and the notes constituted a new mortgage and not a sale and re-sale.³⁸

37—*Warden v. Crist*, 106 Ill. 326.

38—*Harbison v. Houghton*, 41 Ill.

§ 1921. Absolute Deed as Constructive Mortgage—Statute—“Every deed conveying real estate, which shall appear to have been intended only as security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage.”³⁹

The doctrine is well settled that a deed, absolute on its face, if intended to secure an indebtedness, is a mortgage, whether that intention is manifested by a defeasance in writing, by parol declarations, or by acts of the parties.⁴⁰

The authorities are numerous to the effect that the burden of proof is upon the party claiming that a deed absolute is a mortgage to establish that fact, although it is also said that in case of real doubt as to the intention of the parties the courts will be inclined to construe the transaction as a mortgage rather than as a sale, and that the two rules are not inconsistent.⁴¹

§ 1922. Intention of the Parties in Constructive Mortgages the Controlling Question—It must be made to appear clearly that a conveyance absolute was intended as a mortgage by the parties at the time it was executed. It depends upon the intention of the parties at the time of the transfer.⁴²

In determining the intention of the parties the instrument itself must first be looked to, for, as a general rule, where there is nothing equivocal or ambiguous in the terms of the written instrument it should be given effect according to its plain and obvious import of language used, unless to do so would lead to unreasonable and absurd consequences.

While upon the face of the papers the transaction appears to be a sale and not a mortgage, the parties are not precluded from showing that the transaction was in fact intended as a mortgage and not as an absolute sale, and for

39—§ 12, Ch. 95, R. S.

40—Gannon v. Moles, 209 Ill. 180.

41—Schultz v. McCarty, 193 Ill. App. 318.

42—Burgett v. Osborne, 172 Ill.

227; Jeffery v. Robbins, 167 Ill. 375;

Crane v. Chandler, 190 Ill. 584;

Preschbaker v. Heirs of Jacob Feaman, 32 Ill. 475.

the purpose of determining that intention the whole subject is open to inquiry, and parol evidence may be received to show that such deeds and agreements, though plain and unambiguous and absolute on their face, are in fact only security for the loan of money—a mortgage.⁴³

A deed given by one party to another, together with a contract between the same parties providing for the re-conveyance to the grantor, upon the payment of a certain sum of money, the transaction amounts to a mortgage.⁴⁴

Where a party borrows money to purchase land and makes the purchase, but takes the deed in the name of the party loaning the money, the transaction constitutes a mortgage from which the borrower has the right to redeem, on refunding the money borrowed with interest.⁴⁵

And the same principle was applied where a party, at a public sale of land by the government, agreed by parol with the person in possession of the land, and who had made improvements thereon, to bid off his claim, advance the money at a certain rate of interest and to take the title in his own name as security.⁴⁶

A deed, absolute in form, executed as security for any sums the grantee may pay upon certain debts of the grantor verbally agreed upon by them, operates as a mortgage, and the money so paid by the grantee is a lien upon the land thereby conveyed.⁴⁷

Where a party furnishes money to redeem from a judicial sale under an agreement with the judgment debtor that the party so furnishing the money should take an assignment of the certificate of purchase and afterwards an official deed from the officer making the sale, the relation that thus exists between the parties is that of debtor and creditor, and the certificate of purchase and the deed afterwards issued

43—Crane v. Chandler, 190 Ill. 584.

46—Davis v. Hopkins, 15 Ill. 519;

44—Barlow v. Cooper, 109 Ill. App. 375.

Smith v. Sackett, 15 Ill. 528.

45—Thompson v. Thompson, 136

47—Roberts v. Richards, 36 Ill.

Ill. App. 28.

339.

therein, are in effect mortgages to secure the party so advancing the money in his debt against the judgment debtor.⁴⁸

In equity the form of the transaction is not regarded, but the substance must control. It is not the rule in equity that to constitute a transaction a mortgage it should be so expressed in the instrument conveying the land, but it may appear by a separate agreement; nor is it necessary that the deed and defeasance should refer to each other. Their connection may be established by parol proof, and the defeasance need not be in writing. The conveyance may be absolute on its face, and yet be shown by parol that it was intended for security for the payment of money, when it will be treated as a mortgage. In such case all the attendant circumstances will be considered in ascertaining the true character of the transaction.⁴⁹

Where the original transaction between the parties is not in the form of a mortgage, but an absolute conveyance, with a bond to reconvey on the payment of money at a specified time the right of redemption cannot be extinguished, except by an instrument which will operate as a technical conveyance of the mortgagor's interest in the land. He undoubtedly has an estate which will pass by descent, devise or by deed. But it is nevertheless a purely equitable estate, that is to say, an interest in land upon equitable grounds, and which a court of chancery will protect and enforce when equitable considerations so demand. But it is nothing more. The legal title has gone to his grantee by means of a deed absolute upon its face.⁵⁰

§ 1923. Certainty in Contract as to Constructive Mortgages—Where a party to a contract does not draft the same he should be favored in the construction of the same, where the language employed by the other party leaves the meaning uncertain and the intention obscure. So where

48—*Allen v. Allen*, 242 Ill. 510.

50—*Fitch v. Miller*, 200 Ill. 170.

49—*Preschbaker v. Heirs of Jacob Feaman*, 32 Ill. 475.

there is a conveyance by deed and a contract for a reconveyance on conditions, and the evidence leaves it in doubt whether the transaction was a conditional sale or a mortgage, it will, as a general rule, be treated as a mortgage.⁵¹

But it is said by the court that in its researches it has been unable to find any well considered case in which it has been held that an absolute deed should be regarded as a mortgage from the loose declarations of the parties made at the time it was executed, touching their interest or understanding.⁵²

§ 1924. Interest in Land Essential to Constructive Mortgage—In order to render a deed absolute on its face a mortgage, it is essential that the grantor should have some interest in the land which is capable of being mortgaged. Unless the party claiming the right to redeem has such an interest, a bill by him to redeem will be dismissed.⁵³

So where a mortgagor allowed the time limited for him to redeem from a mortgage sale to expire, it was held that he had no title or interest in the premises which was capable of being mortgaged by him.⁵⁴

A deed absolute on its face cannot be claimed to be a mortgage to secure the indebtedness of a third party, without such third party having some interest in the property conveyed. Unless he has such an interest the claim that the deed is a mortgage cannot be sustained.⁵⁵

§ 1925. Debt Essential to Constructive Mortgage—In order to render a deed absolute a mortgage, the evidence must show that the deed was intended as a security, in the nature of a mortgage, which is a conveyance or transfer of property as security for the payment of a debt or the discharge of an obligation, such as the fulfillment of a contract or the performance of an act. The essential characters of a mortgage are a debt, legal liability or obligation

51—Rankin v. Rankin, 111 Ill. App. 403.

52—Suthpen v. Cushman, 35 Ill. 186.

53—Conkey v. Rex, 212 Ill. 444.

54—Carpenter v. Plegge, 192 Ill. 82.

55—Heaton v. Gaines, 198 Ill. 479.

to be secured, and intention to secure the debt, liability or obligation. If the intention is to secure the payment of money, the relation of debtor and creditor must exist. The fact that there is an agreement to reconvey does not render such a conveyance a mortgage, but the essential things are the existence of a debt and the intention to secure its payment. So where a bill was filed for the purpose of procuring a reconveyance of the property, where it was shown that the agreement given the complainant was a mere option to pay when he should be able and desired to do so, with an agreement to reconvey upon such payment, it was held that such transaction did not constitute the deed a mortgage.⁵⁶

In order to determine whether an instrument is a mortgage, or a contract for a purchase and resale, it is necessary to inquire whether any indebtedness existed at the time of the execution of the instrument. If the instrument is a mortgage there must be some debt which the mortgage secures; where the party has no interest in the property, he has no interest which he can mortgage. Where by the terms of the instrument a party is given the option to purchase by paying the amount of the money expended by the proposed vendor within a certain time, the transaction amounts to a contract to purchase and sell.

Where a contract provides that a party is to advance his own money for the purchase of a Master's certificate of sale on a foreclosure proceeding, and there is nothing in the contract to indicate that such party was to advance the money to the mortgagor to enable him to redeem from such sale the money so advanced cannot be regarded as a loan by such party to the mortgagor. And this is to be regarded as the proper construction of such a contract, although there are authorities which hold that the use of

56—Caraway v. Sly, 222 Ill. 203;
Heaton v. Gaines, 198 Ill. 479;
Crane v. Chandler, 190 Ill. 584.

the word "Advanced" it must be regarded as a loan to be repaid.⁵⁷

If the indebtedness be not cancelled, equity will regard the conveyance as a mortgage, whether the grantee so regards it or not. He cannot at the same time hold the land absolutely and retain the right to enforce payment of the debt on account of which the conveyance was made. The test, therefore, in cases of this sort, by which to determine whether the conveyance was a sale or a mortgage, is to be found in the question whether the debt was discharged or not by the conveyance.⁵⁸

§ 1926. Nature and Kind of Indebtedness Unimportant—

Where an absolute deed is intended as a mortgage to secure an indebtedness the nature or kind of the indebtedness intended to be secured is unimportant.⁵⁹

If it shall appear, no matter what the form of the transaction, that the conveyance is, in fact, but an indemnity or security, it will be held to be a mortgage, and the character of the liability against which indemnity is intended, or the kind or dignity of the indebtedness intended to be secured is unimportant.⁶⁰

§ 1927. Evidence Necessary to Establish a Constructive Mortgage—A conveyance purports to convey an absolute estate to the grantee, and it must be taken as the exponent of the rights of the parties, unless some equity is shown, not founded on the mere allegation of a contemporaneous understanding inconsistent with the terms of the deed but independently, both of the deed itself, and the understanding with which it was executed. The right to redeem lands so conveyed cannot be established by simply proving that such was the understanding on which the deed was executed, because equity, as well as the law, will seek for the understanding of the parties in the deed itself. The right must be one paramount to, and independent of, the terms

57—Carpenter v. Plegge, 192 Ill. 82.

58—Fisher v. Green, 142 Ill. 80.

59—Workman v. Greening, 115 Ill. 477.

60—Helm v. Boyd, 124 Ill. 370.

of the deed as well as an understanding between the parties at the time it was executed. Parol evidence is admissible so far as it conduces to show the relation between the parties, or to show any other fact or circumstance of a nature to control the deed and to establish such an equity as will give the right of redemption and no further. In the application of this rule parol evidence is admissible to establish the fact that a debt existed, or money loaned on account of which the conveyance was made, for such facts will, in a court of equity, control the operation of the deed. So, too, in regard to any other fact or circumstances having the same operation.

From some expressions in the opinions in some of the cases decided by the Supreme Court, it has been supposed that a more enlarged rule has been adopted in this state, but a careful examination of them will show that the court has never departed from the rule as enunciated. In examining the reported cases it should be remembered that the manner in which the testimony has been taken in chancery cases has often introduced into the record before the court testimony which was irrelevant and inadmissible, some of which has been reported inadvertently, and care should be taken to ascertain the precise questions presented for consideration by the court, as well as to its decision thereon. The proof must be clear, satisfactory and convincing.⁶¹

The gist of the inquiry in cases where a deed absolute is claimed to be a mortgage is, what was the purpose for which the deed was executed; and it will be found, by reference to the cases, that every fact or circumstance tending to illustrate the purpose and intent of the parties is received in evidence. The fact of an existing indebtedness with respect to which the deed is executed; the retention of the evidence of such indebtedness by the grantee in the deed; that the deed was procured by fraud or oppression, or un-

61—*Suthpen v. Cushman*, 35 Ill. *Hoglund v. Royal Trust Co.*, 159 Ill. 186; *Heaton v. Gaines*, 198 Ill. 479; App. 390.

due advantage; that there was a loan of money; the subsequent conduct of the parties in respect to the land, as, that the grantor had retained possession, and the like, and, indeed, almost every conceivable state of facts legitimately illustrating the transaction, has been held to be competent evidence; evidence of the inadequacy of the price paid is sometimes made a prominent element in the solution of the question involved. The declaration and admissions of the parties contemporaneous with the transaction are admissible, not for the purpose of varying or altering the written instrument, but tending to illustrate what condition of defeasance should be added thereto in equity.⁶²

Where there is an agreement to reconvey upon the payment of the amount for which the conveyance is made, with interest, and the agreement is made at the same time as the conveyance, and in pursuance with the same agreement, and is a part of the same transaction, they must both be taken together, as constituting one entire arrangement, as much so as if they had both been written on the same sheet of paper, and expressly referred to each other. The relation of the two instruments may be shown by parol. Indeed, it is not absolutely necessary that the defeasance should be in writing at all.⁶³

A grantee has the right to show the real consideration of a conveyance, and parol evidence is competent for that purpose.⁶⁴

The real character of the arrangement may as often be gathered from the nature of the transaction and character of the circumstances as from the express declarations of the parties.⁶⁵

The burden of proving that a deed absolute was intended as a mortgage, rests with the party so claiming.⁶⁶

62—Darst v. Murphy, 119 Ill. 343.

63—Miller v. Thomas, 14 Ill. 428;
Freer v. Lake, 115 Ill. 662.

64—Merriman v. Schmitt, 211 Ill.
263.

65—Miller v. Thomas, 14 Ill. 428.

66—Blake v. Taylor, 142 Ill. 482;
Green v. Capps, 142 Ill. 286.

§ 1928. Presumptions Supporting a Constructive Mortgage—Where the grantor is indebted to the grantee at the time the conveyance is made, and there is no evidence of the discharge of the indebtedness, and the payment of the indebtedness can be enforced at any time, the presumption is that the indebtedness is not satisfied by the conveyance. In such case equity will regard the deed as a mortgage whether the grantee so regards it or not. He cannot hold the land absolutely and at the same time retain the right to enforce the payment of the debt, on account of which it was made.

And although the grantor may take a lease from the grantee, still he is not estopped from claiming that the deed was a mortgage, as equity will relieve him from any estoppel created by such an instrument, as well as from the estoppel created by the deed.⁶⁷

§ 1929. Obligation to Convey to a Third Party—Where advances of money is made and a deed is taken as security, and a bond given back to the grantor to reconvey, these facts may incline the courts to a belief that the transaction is a loan and security. But where the conveyance is made by the party to whom the money is paid, and the obligation to convey is given to a third person, there is no such presumption.⁶⁸

Where a party purchases land at the solicitation of another, with an agreement that the party for whom it is purchased will purchase the property from the party so purchasing at an advanced price within a given time, the transaction does not become a loan and mortgage to secure the money so advanced for the purchase of the property. The doctrine is well settled that a party may purchase land for another, take the deed in his own name, and bind himself to convey it to the person for whose interest it was purchased, upon being paid the amount agreed upon by the parties.

⁶⁷—*Suthpen v. Cushman*, 35 Ill. 186.

⁶⁸—*Carr v. Rising*, 62 Ill. 14.

Such purchases and resales are always sustained where the transaction is in good faith, and is not resorted to in order to evade the usury laws, or the transaction is not tainted with fraud. So it is held that where one person purchases land for another, on an agreement that the person for whom the purchase was made will pay a specified price, and secures the payment by a pledge of other lands, there is not a single ingredient of a loan, and although the price agreed to be paid exceeds the lawful rate of interest on the amount paid for the land, the transaction cannot be regarded as usurious.⁶⁹

§ 1930. Deed Absolute, Intended as Security, not Fraudulent as to Creditors—A conveyance of real estate which is absolute on its face, but which is intended as security for an indebtedness is not per se void and fraudulent as to other creditors of the grantor. Such a transaction is not one in which the law implies fraud and will not be void as to creditors unless there is actual fraud in which both the grantor and grantee participated. So where there is an actual indebtedness due from the grantor to the grantee, and all their transactions in regard to the property are in the utmost good faith, and there is no attempt to defraud any one, the transaction will be upheld as against the trustee in bankruptcy of the grantor.⁷⁰

The statute of frauds presents no defense to a suit to declare a deed absolute on its face to be a mortgage where the proof in regard to the mortgage is oral. As early as the time of Lord Nottingham it was held that where a man procured a deed from another under an agreement to give back a defeasance but refused, that a court of equity would afford relief and treat it as though the defeasance had been executed, notwithstanding the Statute of Frauds. It was not intended by the adoption of the statute to facilitate the perpetration of and to protect fraud. The courts will not

69—*Eames v. Hardin*, 111 Ill. 634; 71; *Chicago, B. & Q. R. R. Co. v. Burgett v. Osborne*, 172 Ill. 227. *Watson*, 113 Ill. 195; *DeWolf v.*

70—*Hutchinson v. Page*, 246 Ill. *Strader*, 26 Ill. 225.

permit the statute to be used as an engine of fraud, as its purpose was its suppression.⁷¹

§1931. Right of Redemption from Constructive Mortgage Only Barred by Some Mode Provided by Law—

Where a deed absolute is made as security for a loan and the agreement is that the mortgagor may repay the loan at any time during his lifetime, so that there is no uncertainty as to when the indebtedness will mature, the agreement in that regard is valid. But if it be agreed that if the payment is not made during the lifetime of the grantor, then the deed is to become absolute, that part of the agreement is inoperative, for the reason that the parties cannot make a conveyance of land absolute in form as security for the payment of money on a given day, and provide that if the payment is not made the deed shall become an absolute conveyance. If an instrument is a mortgage of land it remains a mortgage until the right of redemption is barred by some of the modes recognized by law, and the right of redemption cannot be cut off by the agreement of the parties.⁷²

If the statute of limitations bars a foreclosure, it for the same reason bars a redemption from the deed, regarded as a mortgage, for the right to redeem and the right to foreclose are reciprocal, and when the one is barred the other is barred,⁷³ and the grantee in the deed need not file a bill to cut off the equity of redemption, the title being absolutely in him.⁷⁴

§1932. Right of Redemption Extinguished by Parol Agreement—While a condition of defeasance may rest in parol, or verbal agreement between the parties, it may be extinguished the same way.⁷⁵

Where the relation of mortgagor and mortgagee exists by

71—Linkemann v. Knepper, 226 Ill. 473.

72—Halbert v. Turner, 233 Ill. 531.

73—Carpenter v. Plagge, 192 Ill. 82.

74—Green v. Capps, 142 Ill. 286.

75—Hutchinson v. Page, 246 Ill. 71; Cramer v. Wilson, 202 Ill. 83; Deadman v. Yantis, 230 Ill. 243.

virtue of a deed absolute, with a contract back to reconvey to the grantor, such a relation may be terminated by a surrender of the contract to reconvey. Where the transaction is fair and not attended with oppression or fraud or undue influence, and the mortgagee has not taken advantage of his position to obtain an advantage over the mortgagor, a bona fide agreement between the parties to vest the entire estate in the mortgagee will be sustained, and the execution of a formal deed by the mortgagor to the mortgagee will not be required.⁷⁶

§ 1933. Redemption from Constructive Mortgage Allowed in Equity—Under the established law of this state a deed absolute on its face with a parol or verbal defeasance is valid, and the party entitled to an equity of redemption may maintain a bill to redeem if the fact can be established by that quantity of proof that the law demands.⁷⁷

Early in the history of this state it was held that a deed absolute on its face, and at the same time an agreement is entered into between the grantor and the grantee, that the property shall be released and reconveyed, upon the payment of a certain sum of money with interest, at a certain time, created a mortgage, and the grantor was entitled to redeem therefrom even where a conveyance had been made to an innocent third party, who had constructive notice.⁷⁸

And any attempt on the part of the vendee to complicate the title will not prevent the court from investigating and ascertaining the true character of the transaction, and affording an equitable relief.⁷⁹

In an action in ejectment by the grantee in a deed absolute in form, against the grantor, the defendant cannot show in his defense that the deed was in fact only a mortgage. In such case the defendant's remedy is in equity,

76—*Seymour v. Mackey*, 126 Ill. 341.

77—*Deadman v. Yantis*, 230 Ill. 243.

78—*Miller v. Thomas*, 14 Ill. 428.

79—*Davis v. Hopkins*, 15 Ill. 519.

where he may enjoin the action at law, and show the true character of the deed.⁸⁰

§ 1934. Innocent Grantee Allowed for Improvements—

Where a grantee in a deed absolute, but in reality a mortgage, before the time of redemption conveys the property to a third person who has constructive notice of the rights of the original grantors, but who honestly believes he has a good title and makes valuable improvements thereon, but not with the view of enhancing the redemption money, a court of equity will allow him for such improvements on an application to redeem.⁸¹

§ 1935. Form of Decree Allowing Redemption from Constructive Mortgage—The ordinary decree, on allowing parties to redeem from a constructive mortgage, is that the complainant be allowed to redeem the premises upon the payment of the sum of money found to be due within a reasonable time fixed therein together with the costs, and directing the mortgagee to discharge the mortgage, or to convey the property to the mortgagor on the payment of the money, and that on default of such payment that the bill be dismissed.

But where the bill is for the foreclosure of a deed held to be a mortgage, and the relief granted is that of the foreclosure of a mortgage, in default of the payment of the money found to be due, the court should order a sale of the property, so as to permit the mortgagor to redeem the same in accordance with the statute.⁸²

§ 1936. Sale by Mortgagor to Mortgagee with a Contract to Reconvey—If the transaction between the parties be considered an absolute sale by the mortgagor to the mortgagee, and a contract be given back to the mortgagor to reconvey the premises to him upon his paying a given sum within a given time, the transaction will not be regarded as

80—*McGinnis v. Fernandes*, 126 Ill. 228.

81—*Miller v. Thomas*, 14 Ill. 428.

82—*Carpenter v. Plagge*, 192 Ill. 82.

a deed absolute to be considered as a mortgage, and the vendee under the contract will not be allowed to redeem the premises, and if the contract be recorded the grantee in the deed may maintain a bill to remove the record thereof as a cloud upon his title.

The mortgagee has a right, if he thinks proper, and can agree with the mortgagor on the terms of purchase, to purchase the mortgage premises, and the mere fact that the deed was made in satisfaction of a prior mortgage does not make such deed a new mortgage. An absolute deed delivered in payment of a debt is not converted into a mortgage merely because the grantee therein gives a contemporaneous stipulation binding him to reconvey on being reimbursed, within an agreed period, an amount equal to the debt and interest thereon. If the conveyance extinguishes the debt, and the parties so intended, so that a plea of payment would bar an action thereon, the transaction would be an absolute sale notwithstanding.

And so, if there was in fact a sale, an agreement by the purchaser to resell the property within a limited time, at the same price, does not convert the deed into a mortgage. Whatever presumption may arise that the transaction was a mortgage, when a deed has been given, and at the same time a contract for a reconveyance executed may be repelled by showing that the debt was surrendered and cancelled at the time of the conveyance, so that there is no debt upon which the mortgage can operate.⁸³

Where a contract is entered into between the mortgagor and a third party providing that the third party shall advance money for the purchase of a Master's certificate of sale, and hold the same for his own benefit, unless the mortgagor shall within a certain time pay such third party the money so advanced by him, with interest, and on the payment of such money within such time by the mortgagor, then the certificate was to be assigned to the mortgagor—time

83—*Eue v. Dole*, 107 Ill. 275.

being made the essence of the contract—such a contract amounts to an agreement to convey upon the payment of the purchase price, and is not to be regarded as a mortgage. And where such a contract is in writing, and the interest of either party thereto is expressed in writing, it will be presumed that the actual and entire interest is fully expressed.⁸⁴

§ 1937. Agreement Between Mortgagee and Mortgagor to Re-Purchase After Foreclosure, Enforcible in Equity—Where it is a part of the agreement under which the complainant obtains the title to several lots that a decree of foreclosure shall be entered and that the premises shall be sold under the decree for the purpose of clearing the different tracts of land from certain incumbrances, and that after the title becomes vested in the mortgagee the mortgagor may purchase or redeem a certain portion of the land at a certain stipulated price, the rights of the mortgagor are not cut off or in any manner impaired by the decree. A court of equity will enforce the agreement.⁸⁵

§ 1938. Description of the Indebtedness Secured by Mortgage—If a mortgage is given for an ascertained debt, the amount of the debt should be stated, and if it is intended to secure a debt not ascertained such data should be given respecting it as will put any one interested upon inquiry leading to a discovery in that respect. If it is given to secure an existing or future liability the foundation of such liability should be set forth. The spirit of our recording system requires that the record of a mortgage should disclose, with as much certainty as the circumstances will admit, the real state of the incumbrance.⁸⁶

§ 1939. Imperfect Description not Fatal—While it is the law that the amount of the indebtedness intended to be secured by the mortgage should be stated in the mortgage,

⁸⁴—*Carpenter v. Plagge*, 192 Ill. 82.

⁸⁶—*Bullock v. Battenhausen*, 108 Ill. 28.

⁸⁵—*Union Mt. L. I. Co. v. Kirchoff*, 133 Ill. 368.

still, if not given, if such data is given in the mortgage that the amount of the indebtedness can easily be ascertained that will be sufficient to validate the mortgage. So where the mortgage recited the date of the note, the names of the maker and the payee, the date of payment, the rate of interest, and that the same should be payable quarter yearly, and that coupons were executed as evidence thereof, each being for the sum of \$105, and coming due respectively on the 12th day of April, July, October, 1894, and January, April, July and October, 1895, and January, 1896, but the sum of money to be paid was not expressly stated in the description of the indebtedness in the mortgage, this, however, was held to be wholly unnecessary, as inquiry aliunde the description given in the mortgage should be made in order to ascertain the principal sum. The principal of the note was the sum upon which interest at the rate of seven per cent per annum would amount to \$105, in three months, or \$420, in one year. Everything necessary to define the nature of the mortgage indebtedness was accurately set forth, so that another indebtedness could not be substituted for it. Nothing in the description given tended to deceive or mislead, and the description, within itself, recited facts which disclosed the amount of the incumbrance created by the mortgage with no less certainty than had such amount been expressly stated.⁸⁷

Where the consideration upon which the mortgage or trust deed is executed is recited as a certain sum of money, but in describing the notes which it is made to secure the amount thereof is not stated, upon a foreclosure, parol evidence is admitted in evidence as to the sum mentioned as the consideration for the instrument, this is sufficient to put all persons acquiring interest in or claims against the real estate conveyed upon notice that the instrument, at least inferentially created a lien at least to the extent of the recited consideration, until the contrary could be made to appear

87—Gardner v. Cohn, 191 Ill. 553.

by an examination of the notes insufficiently described in the instrument. The failure to recite the amount of the notes is so clearly a mistake that in view of the other recitals, parol evidence may be admitted to supply such an evident defect.⁸⁸

Where the bill is in the ordinary form of a bill of foreclosure without setting forth the real consideration for the mortgage, it does not follow that the complainant must fail in his suit because the allegations and the proof in regard to the consideration do not correspond. Where the bill shows that the mortgage was made to secure the payment of a certain promissory note, it is not necessary to state the consideration for the note, and if the bill shows a case where the complainant is entitled to a decree, this is all that is required, in the first instance, on the part of the complainant. The defendant has a right to come in and inquire as to the consideration of the note. Although the complainant may not be entitled to a decree for the full amount claimed by him, it surely cannot be objected that he is not entitled to a decree for the amount which the evidence shows he is entitled to. It is immaterial what the consideration for the note was, so that it is a good and valuable one. The recovery is upon the mortgage as set forth in the bill, though the extent is limited by the facts disclosed by the testimony. The question of variance between the allegations and the proof cannot be raised in such a case.⁸⁹

§ 1940. Mortgage Securing Future Advances—A mortgage may be made to secure future advances, and become a prior lien for the amount loaned, although advancements are made after a subsequent mortgage is in force. Where several notes are made at the same time and several trust deeds are made to secure the payment thereof, and these are all delivered to the same party at the same time,

88—Dunn v. Burke, 139 Ill. App. 12.

89—Collins v. Carlisle, 13 Ill. 254; Powell v. Huey, 241 Ill. 132.

he is, as far as appears, the owner of them all, and as such it is within his power to give priority to either, if he chose so to do. And he does so determine by having one of the trust deeds recorded before the other, and thereby gives notice to subsequent purchasers of the notes secured, that one of the notes is given priority by recording the trust deed, securing it prior to the other trust deed. From that time anyone acquiring one of the notes takes it subject to the equities of the holder of the other notes, and is put upon inquiry in that regard.⁹⁰

§ 1941. Tacking Subsequent Debts to Mortgage Loans—

There are a number of respectable authorities which hold that a mortgagee cannot tack to his mortgage debt subsequently incurred obligations, and require their payment by the mortgagor as a condition as his right to redeem.

Other authorities, however, hold to the contrary and the substance of them may be stated as follows: If a person entitled to redeem, goes into equity for that purpose, and he owes the mortgagee other sums than that secured by the mortgage, relief will be granted only on his paying the total amount of his indebtedness, in accordance with the maxim that he who asks equity must do equity, and to prevent circuity of actions.

This doctrine, however, is under the authorities, limited to cases where the mortgagee is invested with the legal title to the property, and makes further advances, in addition to the original debt secured, upon the credit of the land to which the title is held, and when the legal title is made available to secure the advances by a legal contract between the parties; and where the rights of subsequent incumbrancers, or persons who have acquired junior liens are not prejudiced thereby. Debts created or advances made by the mortgagor subsequent to the mortgage, cannot be tacked to the mortgage debt to the prejudice of third persons, who have acquired junior liens upon the mortgaged property.⁹¹

⁹⁰—Schimberg v. Waite, 93 Ill. App. 180.

⁹¹—Carpenter v. Plagge, 192 Ill. 82.

§ 1942. **Substituting or Changing Securities**—The question whether a change of securities for the same indebtedness affects or changes the priorities has been considered with reference to different rights and interests, and it has uniformly been held that it does not produce such a result. So, where a party held a deed absolute as security for a debt, which was a first lien, it was arranged between the parties that the creditor should make a reconveyance to the debtor and he should make a mortgage to secure the indebtedness to the creditor, which arrangement was carried into effect. The holder of a judgment junior to such indebtedness insisted that such an arrangement let in his judgment as a prior lien to the mortgage. It was said by the court that the parties had no intention to change their relation, but simply to put the security in a different form, and it was held that there was no change in the rights or priorities of the parties. And the taking of a new mortgage to secure the payment of the same debt as was secured by an old mortgage, and releasing the old mortgage, did not give priority to another mortgage recorded before the new one was given. If the parties are not deceived or misled, and part with nothing on the faith of the release of the prior security, and there be no intention on the part of the parties interested to release or affect in any way the prior lien, the transaction will not have that effect. The parties are in the same relative position after the transaction as they were before.⁹²

Whether the giving of a new note operates to discharge mortgage given to secure a former note depends upon the intention of the parties, and it is competent for them to preserve the validity of the former note and mortgage as a lien if they desire to do so. It is competent for them to agree as to preservation of the lien.⁹³

If a release of a mortgage is obtained through fraud or

92—*Roberts v. Doan*, 180 Ill. 187;
Christie v. Hale, 46 Ill. 117; *Shaver*
v. Williams, 87 Ill. 469.

93—*Stein v. Kaun*, 244 Ill. 32.

mistake, the mortgagee is entitled to relief in having the old mortgage retained.⁹⁴

But where a subsequent promissory note is given for the same consideration as a former one, it is a question of fact, to be determined by a jury, whether the former note is thereby satisfied. If the subsequent note is executed and accepted by the respective parties for that purpose, the satisfaction is complete.⁹⁵

Where a judgment is recovered at law on the note secured by a mortgage, the note becomes merged in the judgment and no longer exists. It ceases to be an evidence of indebtedness against the maker, and no suit at law or equity, after the judgment thereon can be maintained upon it. As to such note the character of the mortgage, by the entry of judgment on the note, is changed, and instead of the mortgage standing as security for the note it then stands as security for the judgment on the note, and to entitle the complainant to a decree in this regard he should set forth his judgment in his bill and not the note. In other words he should declare on the judgment and not on the note.⁹⁶

§ 1943. Purchase Money Mortgage—It is a principle of law too familiar to justify a reference to authorities, that a mortgage given for the purchase money of land, and executed at the same time the deed is executed to the mortgagor, takes precedence of a judgment against the mortgagor. The execution of the deed and the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagee without stopping at all in the purchaser, and during such instantaneous passage, the judgment lien cannot attach to the title. This is the reason assigned by the books, why the mortgage takes precedence of the judgment rather than any supposed equity

94—*Farrand v. Long*, 184 Ill. 100.

96—*Jocelyn v. White*, 201 Ill. 16.

95—*Hass v. Lobstein*, 108 Ill. App.

which the vendor might be supposed to have for the purchase money; though that consideration may have originated the rule at first.

Upon the delivery of the deed the mortgage becomes effective, and the title passes to the mortgagor, subject to the lien of the mortgage.⁹⁷

And this has been held to be the rule although the mortgage may not be recorded till several months after the delivery thereof.⁹⁸

§ 1944. Presumptions of Law as to Purchase Money Mortgages—Where a deed is made to a grantee, and he executes a mortgage to his grantor, both instruments executed, acknowledged and recorded the same day, and conveying the same property, it will be presumed, in the absence of evidence to the contrary, that the mortgage was given to secure the unpaid purchase money for the property conveyed to the grantee, that it was in fact a purchase money mortgage. But such presumption is not conclusive; it may be rebutted.⁹⁹

§ 1945. Purchase Money Mortgage, Prior Lien to Judgment Against Mortgagor—A mortgage to secure the purchase money of land, even though not recorded, takes precedence over a prior judgment against the vendee. But this rule has no application to subsequent judgments. The recording act applies only to subsequent and not to prior purchasers, and a failure to record a mortgage, though not affecting it as to prior purchasers, by reason of Section 30 of the Conveyance Act, makes it void as to subsequent purchasers without notice.¹

Where a party buys land incumbered with a mortgage, and contemporaneously with the purchase, and as a part thereof, executes a note and mortgage in lieu of the one

97—Curtis v. Root, 20 Ill. 518;
Roane v. Baker, 120 Ill. 308; Har-
row v. Grogan, 219 Ill. 288.

98—Roane v. Baker, 120 Ill. 308;
Elder v. Derby, 98 Ill. 228.

99—Harrow v. Grogan, 219 Ill. 288.
1—Thorpe v. Helmer, 275 Ill. 86.

previously given, thus assuming the payment of the mortgage as a part of the purchase price, the latter mortgage will have priority over a judgment recovered against the purchaser prior to the making of his mortgage.²

A mortgage given for the purchase money of land, executed at the same time the deed is executed to the mortgagor, taking precedence over a then existing judgment against the mortgagor even though the mortgage may not have been recorded for months after its execution; but if the judgment creditor had purchased the property during the time the mortgage was recorded, and without notice of the mortgage, he would take precedence over the mortgage.³

A vendee purchased property in 1872, and in 1875 gave a mortgage thereon which was claimed to be for a part of the purchase money, but it was not so recited in the mortgage. Before the execution of the mortgage a party recovered judgment against the mortgagor and proceeded to levy upon and sell the property. At the sale notice was given that the mortgage was given for part of the purchase money of the premises and the sale forbidden. It was said by the court that this was no more information except as to the purchase money than the record of the mortgage gave. The purchaser at the execution sale knew from the record that the judgment debtor had given a mortgage on the premises, but he saw that it was subsequent to the judgment, and therefore subordinate thereto. The added information that the notice gave, that the mortgage was to secure purchase money, did not avail anything, as the court could see. Such a notice, given after a judgment rendered, would not affect the lien of the judgment which arose on its recovery, and, at most, the notice was but of an equity with respect to the land.⁴

§ 1946. Oral Agreements as to Purchase Money Mortgages Enforced in Equity—If the grantee agrees with the

2—Whittemore v. Schiel, 14 Ill. App. 414.

3—Roane v. Baker, 120 Ill. 308.

4—Byhiner v. Frank, 105 Ill. 326.

grantor to execute to him a mortgage for the unpaid purchase money, but fails to do so, a court of equity will treat that as done which was agreed to be done, and render a decree subjecting the premises to the payment of the amount yet remaining due and unpaid. And as against a purchase money mortgage the widow of the grantee has no right of dower. It is expressly so provided by the statute.⁵

§ 1947. Purchase Money Mortgage for Less Quantity or Estate than that Granted by the Deed—It is manifest that where the deed, and mortgage back to secure the purchase money, are parts of the same transaction, one estate may be conveyed by the deed and a wholly differing interest conveyed by the mortgage—as, if the fee be granted by the deed, and an estate for life or for years be mortgaged. The power of the parties to so contract cannot be questioned. If the vendor sees proper to take security by mortgage upon less than the whole land, or upon less than the estate conveyed by the deed, for the unpaid purchase money, there is no reason why it would not be a valid contract, and the residue of the land, or of the estate pass by the deed, unincumbered by any lien in his favor.⁶

§ 1948. Covenants in Mortgages—Besides the ordinary covenants in deed there are usually a number of special covenants in mortgages such as requiring the mortgagor to pay the taxes, keep the premises in good repair, insured for the benefit of the mortgagee, and such others as may be deemed desirable.

Covenants in a mortgage usually receive the same construction that they do in a conveyance of the title absolutely. The principal one of these covenants is the one relating to the payment of the taxes and assessments levied upon the property by the mortgagor.

§ 1949. Covenant of Mortgagor to Pay Taxes—The proper construction of the covenants contained in a mortgage or trust deed is, that the failure of the mortgagor to

5—Lohmeyer v. Durbin, 206 Ill. 574.

6—Lehndorf v. Cope, 122 Ill. 317; Harrow v. Grogan, 219 Ill. 233.

keep and perform his covenant to pay and discharge all taxes and assessments levied upon the land and to protect the premises from sale for delinquent taxes and assessments, confers upon the holder of the note secured by the mortgage or trust deed the right to decline to permit the money loaned upon the security of the land to remain longer unpaid, notwithstanding the terms and condition of the note given to evidence the loan. The provision that the holder of the note might pay any unpaid taxes and assessments or redeem the land from tax sales, if any were made, is incorporated in the mortgage or trust deed for the purpose of enabling the mortgagee to relieve the lands, upon which he relied as security, from incumbrance and sale which might destroy or impair their value as security to him. His right to declare the principal debt secured by the trust deed to be due arises out of the failure of the owners of the land to protect the same from unpaid taxes. It was not essential to the existence or exercise of the right that he should pay unpaid taxes and assessments or redeem the land from sale for delinquent taxes or assessments. He could foreclose without making such payment or redemption.

The failure of the mortgagor in a mortgage or trust deed, in violation of his covenants to pay the taxes on the property, the holder of the note, where the mortgage or trust deed so provides, may declare the principal sum due and payable and institute foreclosure proceedings, notwithstanding by the terms of the note the principal sum is not then due.⁷

§ 1950. Sale for Taxes of an Infinitesimal Part of the Mortgaged Land—The sale of the east vigintillionth of the mortgage premises constitutes such a claim, cloud or incumbrance upon the title as, under the covenants of the

⁷—Gray v. Robertson, 174 Ill. 242;
Brockway v. McClun, 243 Ill. 196.

mortgage, the mortgagee has the right to remove, without the consent of the mortgagor.

It may be true that if this tax sale had not been removed but allowed to ripen into a tax deed the holder might not be able to maintain ejectment, or if judgment be rendered in his favor there might be difficulty in obtaining possession under a writ, on account of the diminutive quantity of land sold, still the sale of the unpaid taxes is nevertheless an incumbrance, which the mortgagee has the right, under the terms of the mortgage, to remove. The question involved is not what title would be acquired by such a sale, but, as between the mortgagor and mortgagee, under the covenants of the mortgage was the sale an incumbrance which the mortgagee had a right to insist should be removed? And it was held that it was.⁸

§ 1951. Right of Mortgagee to Acquire a Tax Title as Against the Mortgagor—The law appears to be well settled that a mortgagee in possession is not entitled to obtain a tax title to the mortgaged premises and set it up to defeat the right of redemption in behalf of the mortgagor; but whether a mortgagee out of possession may lawfully acquire a title by means of a tax sale, and thus cut off the equity of redemption by a mortgagor, is a question upon which the authorities are not harmonious. In Illinois, however, the courts are of the opinion that the clear weight of authority establishes the rule that a mortgagee, whether in or out of possession, cannot acquire and set up a tax title in the mortgaged premises as against the mortgagor.⁹

§ 1952. Re-Payment of Taxes by Party Redeeming—The legislature in 1889, passed an act by which it was provided, that where the purchaser of real estate at a sale under a judgment or decree shall pay taxes or assessments which have become a lien during the time allowed for redemption, and the premises are redeemed, such taxes and assessments

⁸—*Stinson v. Connecticut L. I. Co.*,
174 Ill. 125.

⁹—*Stinson v. Connecticut L. I. Co.*,
174 Ill. 125.

so paid, with interest, are to be included in and paid as part of the money required to make the redemption. This is manifestly just, for the reason that, the redemption being made, the payment of the taxes inures to the benefit of the mortgagor and to the preservation of his estate, and this undoubtedly led to the enactment. No such reason, however, exists where no redemption is made. There, the payment of the taxes inures to the benefit of the purchaser, and can in no wise be of benefit to the mortgagor.¹⁰

§ 1953. Payment of Taxes by the Receiver—It is not the duty of a receiver after a sale to pay the taxes on the property involved in the receivership, and it is not necessary to retain the receiver in office in order to authorize him to pay the taxes, which the owner of the equity of redemption is not bound to pay till after the expiration of the time for redemption.¹¹

§ 1954. Power of Court to Authorize Receiver to Pay Taxes and Assessments—It is erroneous for an order appointing a receiver to direct him to pay all taxes, assessments and public charges duly and regularly levied out of the incomes and rents. The grantor in the deed of trust or the mortgagor or owner of the equity of redemption, is entitled to receive the benefit of the rents, issues and profits, where the same are not otherwise pledged.¹²

§ 1955. Tax a Lien—Only on Distinct Tracts—Under our system of taxation the tax on each tract of land is kept separate and distinct from every other tract, and such tax can only become a debt against the owner to be recovered in a personal action against him.¹³

And the statute has not made the taxes due on one tract a lien upon another tract. So, if in a suit against the owner, for the taxes on several tracts of land, a judgment be rendered for the gross amount of all the taxes, such a judg-

10—*Davis v. Dale*, 150 Ill. 239; *Bogardus v. Moses*, 181 Ill. 554.

11—*Bogardus v. Moses*, 181 Ill. 554.

12—*Christie v. Burns*, 83 Ill. App. 514.

13—*Binkert v. Wabash Ry. Co.*, 98 Ill. 205.

ment cannot be regarded otherwise than having been on an ordinary claim, where personal judgment is recovered on personal service.¹⁴

§ 1956. Dower Rights of Wife of Mortgagor in Purchase Money Mortgage—The wife of a mortgagor in a purchase money mortgage, although she may not have signed the same, is not entitled to dower, as against the mortgagee, in the premises, and she is not a necessary party to the foreclosure of such a mortgage.¹⁵

§ 1957. Priority of Mortgage Liens—Where there are several mortgages on the same piece of property, it becomes necessary and important to determine which, if either, has priority over the other.

Where two mortgages are made by the same mortgagor to the same mortgagee, of different dates, but acknowledged and recorded at the same time, to secure two notes of even date with the mortgages, and payable to the mortgagee or order and delivered to a loan broker to negotiate a loan, the one bearing the lowest number and bearing the first date being first negotiated by the loan broker, will be held to be a first lien on the property mortgaged, where the property described in the mortgages are the same.¹⁶

Where a mortgage is given to secure several notes coming due at different times the note first coming due is entitled to complete satisfaction out of the premises in the first instance. That is, the holder of such a note has priority, and can foreclose and sell the mortgaged property to satisfy his claim. They have priority of liens in the order in which they respectively fall due for payment, the same as though they had severally been secured by different mortgages. But in such case the mortgagee or holder of the several notes may stipulate with anyone to whom he may assign one or more of the notes, that the notes which he shall retain shall have a preferred lien on the

14—*Kepley v. Jensen*, 107 Ill. 79.

16—*Fischer v. Touhy*, 186 Ill. 143.

15—*Harrow v. Grogan*, 219 Ill. 288.

mortgaged premises, and where such a stipulation is entered into, it will be recognized and enforced in a foreclosure proceeding.¹⁷

§ 1958. Second Mortgagee Estopped from Denying Validity of Prior Claim or Lien—There are several authorities which hold that a grantee or mortgagee whose rights are made subject to a prior claim or lien, is estopped from denying the validity of such prior claim or lien. But this rule does not vest the owner of such prior claim or lien with authority to demand and receive more than is actually due him; if it did, he could not be required to account for payments made to him upon his debt, after taking his mortgage or other security.¹⁸

§ 1959. Assignment of Mortgages—It is a well established principle of equity that a mortgage, not being assignable at law, and only in equity, the assignee takes it subject to all equities existing between the original parties to it. The law in this regard was announced in the case of *Olds v. Cummings*, 31 Ill. 188, and has been adhered to and applied in every subsequent case that has come before the Supreme Court where the same question is involved.¹⁹

The fact that the assignee takes the note by assignment before maturity, does not thereby protect the mortgage against equitable defenses. Not only so, but where a mortgage is assigned, and the mortgagor without notice thereof pays the payee, who has parted with the note that will discharge the mortgage, and in a suit to foreclose, such payment may be set up in bar of a decree of foreclosure. The mortgagor, to release himself from liability on the note, must see that he pays the money to the holder of the note, who has received it by assignment before maturity, but this is not true as to the discharge of the mortgage,

17—*Vansant v. Allmon*, 23 Ill. 30; *Romberg v. McCormick*, 194 Ill. 205; *Walker v. Dement*, 42 Ill. 272; *Koester v. Burke*, 81 Ill. 436; *Jackson v. Grossner*, 218 Ill. 494.

18—*Henneberry v. Binns*, 125 Ill. App. 499.

19—*Towner v. McClelland*, 110 Ill. 542; *Bartholf v. Bensley*, 234 Ill. 336.

because the mortgage is not assignable at law. An equitable assignee of the mortgage, to protect his rights against a payment by the mortgagor to the mortgagee, must give the former notice, actual or constructive, of the assignment. He may place the assignment on record, or give notice of the assignment to the mortgagor.²⁰

If the assignee fails to give the mortgagor notice of the assignment he cannot relieve himself from his own negligence by simply showing that the mortgagor failed to take up the note and mortgage when he paid the debt to the original mortgagee.

Such notice would have enabled the maker to protect himself from the fraud of the original holder by making the payments to the true owner. And such notice is necessary if the assignee desires to avail himself of his rights under the mortgage or trust deed.²¹

But this rule does not apply where the mortgagor has sold the property, and the purchaser has assumed and agreed to pay the debt. There are many cases where the assignees of the mortgage debt have been protected against the latent equities of third persons. The reason is that a purchaser of a mortgage is under a duty to inquire of the mortgagor if there be any reason why it should not be paid, but he should not be required to inquire of the whole world to see if some one may not have a latent equity which might be interfered with by his purchase of the mortgage. So if a purchaser from the mortgagor has assumed and agreed to pay the debt, he must see to it that he pays the true owner of the debt.²²

§ 1960. Rights of Assignee of Mortgage the Same as Mortgagee—Where a party purchases a prior mortgage in order to protect his junior mortgage, he thereby acquires

20—*Towner v. McClelland*, 110 Ill. 542.

21—*Napieralski v. Simon*, 198 Ill. 384; *Towner v. McClelland*, 110 Ill. 542.

22—*Schultz v. Stroelwitz*, 191 Ill. 249.

no rights or remedies greater than the assignor had in respect to such mortgage.²³

§ 1961. Assignee of Mortgage Takes Same Subject to all Equities—An assignment of a chose in action, other than a negotiable instrument, is not perfect so as to protect the assignee as against equities between the original parties, without notice of the assignment to the debtor. This is the general rule, and unless mortgages and trust deeds are to be treated as an exception, the rule must be applied to them. If the assignee would protect himself he should give notice of the assignment to the debtor.

In a suit to foreclose a mortgage the law is well settled in this state that as a mortgage is a mere chose in action and not negotiable, the mortgagor who has no notice of the assignment of the mortgage may interpose any defense arising out of the transaction with the mortgagee which he could set up against the mortgagee had the suit been commenced by him. This rule was announced in this state in the case of *Olds v. Cummings*, 31 Ill. 188, and has been restated and applied in many cases. The assignee of a mortgage takes it subject to the equitable defenses of the mortgagor. The reason given is that it is the duty of the purchaser of the mortgage, it not being assignable so as to vest the legal interest in him to inquire of the mortgagor if there be any reason why it should not be paid. In case of the assignment of a mortgage the assignee occupies the same position that the mortgagee would, and the mortgagor may interpose any defense that would defeat the recovery by the mortgagee. This rule, however, applies only to transactions arising out of the note and mortgage themselves, and does not extend to matters arising out of collateral transactions.²⁴

§ 1962. Assignee of Mortgage Takes It Free from Latent Equities of Third Persons—But the assignee of a mortgage

²³—*Griesbaum v. Baum*, 18 Ill. App. 614.

²⁴—*McAuliffe v. Reuter*, 66 Ill. App. 32.

takes it subject only as to the equities existing in favor of the mortgagor, and not subject to latent equities in favor of third persons in the subject involved in the assignment of which he had no notice.²⁵

Where a complainant claims that certain notes and trust deeds were obtained from him by fraud, if it appears that he parted with the papers knowingly and voluntarily, and thereby enabled the party to whom they were delivered to commit a fraud upon him, he will be obliged to bear the loss. And the party to whom they may subsequently be transferred, if taken in good faith, for value, and before maturity and in the usual course of business, will hold them free from any claim of the complainant.²⁶

§ 1963. Rights of Assignee of Mortgage Not Affected by Acts of Mortgagee After Assignment—Where a negotiable instrument is secured by a mortgage, duly recorded, describing the instrument and the mortgagee assigns the instrument before maturity, if the mortgagor desires to make another mortgage upon the same property, which is to be a first lien thereon, it is the duty of the mortgagee in such second mortgage to inquire and see to the payment of the security mentioned in the first mortgage and if he fails to do so, he is guilty of such negligence as will let the holder of the instrument mentioned in the first mortgage to foreclose the same as a first lien on the premises. And the fact that the first mortgagee, after its assignment, released the same, without surrendering the first mortgage and the instrument it secured, will not affect the rights of the assignee of the first mortgage, where it does not appear that the first mortgagee was the agent of such assignee to receive the money and execute a release of the first mortgage. The second mortgagee being put upon inquiry, he is chargeable with notice of the rights of the assignee of the securities described in the first mortgage.²⁷

25—*Humble v. Curtis*, 160 Ill. 193;
Mann v. Merchants' L. & T. Co., 100
Ill. App. 224.

26—*Kittler v. Studebaker*, 113 Ill.
App. 342.

27—*Keohane v. Smith*, 97 Ill. 156.

§ 1964. **Payment of Indebtedness to Mortgagee After Assignment of Securities Without Notice**—The authorities abundantly sustain the proposition that where a mortgage has been assigned, and the mortgagor without any negligence on his part and without any knowledge of the assignment so made, pays the payee, who has parted with the note that will discharge the mortgage, and in a suit to foreclose the mortgage such payment may be set up in bar of a decree of foreclosure. The purchaser knows who the mortgagor is from the papers, and may, by notice and inquiry, protect himself in making the purchase much more readily than the mortgagor may if for any reason he is unable to obtain at once the cancellation and return of his obligations.²⁸

§ 1965. **Mortgagor Assenting to the Assignment of the Mortgage**—While it may be the rule in equity that the assignee of a promissory note the payment of which is secured by a mortgage, takes the mortgage subject to any defenses which the maker has against the original mortgagee, the rule is different where the mortgagor consents to the assignment of the mortgage.²⁹

§ 1966. **Mortgagee Trustee for the Assignee of Mortgage**—A mortgage securing the payment of a note, being but an incident to the debt, whatever is sufficient to transfer the title to the debt will, in equity, also transfer the interest of the mortgagee in the mortgage, and the mortgagee after having assigned the mortgage debt, thereafter holds the mortgage for the benefit of the assignee of the mortgage debt.³⁰

Where a mortgagee executes an assignment of the mortgage, and the same is duly recorded, he can thereafter do no act in relation to the mortgage which will prejudice the

28—*Bartholf v. Bensley*, 234 Ill. 336.

29—*Meledny v. Keen*, 89 Ill. 395.

30—*Fountain v. Bookstaver*, 141 Ill. 461.

rights of the assignee; all parties dealing with the property are charged with notice of the assignment.³¹

§ 1967. Mortgage as Collateral Security—A creditor, holding goods, chattels or tangible personal property, as a pledge to secure the payment of the indebtedness to him, may sell the same and apply the proceeds to the payment of his debt, accounting to his debtor for the surplus. From the nature of the property the only method of applying it to the payment of the debt is through a sale. This rule, however, does not apply to bonds, mortgages or promissory notes, which are available for the payment of the principal debt by collecting them and applying the proceeds. A creditor holding such securities has three remedies; he may file his bill to have the collaterals sold for the payment of the principal indebtedness; or he may sue upon the collaterals themselves; or collect the same by a sale of the property conveyed in trust to secure them. The creditors in the absence of a power of sale given him by the debtor, cannot sell commercial paper or choses in action, but may collect the same and apply the proceeds to the payment of his debt, and if there is any balance, return it to his debtor. If the collateral security consists of a mortgage, the holder has the right to foreclose it. But on a foreclosure the complainant, whether he be the original pledgee or his assignee, he can have a decree only for the amount that is actually due on the principal debt.³²

§ 1968. Mortgage Discharged When Assigned to Mortgagor—Where one who has conveyed land by deed with full covenants of warranty which is subject to a mortgage to which no reference is made, whether made by him or another, afterwards takes an assignment of the mortgage, he holds it for the benefit of the person to whom he has granted the land and the mortgage is, in fact, discharged by coming into his hands. Even if he afterwards should

31—*Center v. Elgin City Banking Co.*, 185 Ill. 534.

32—*Peacock v. Phillips*, 247 Ill. 467.

assign it to one who in good faith pays full consideration for it, the purchaser would acquire no lien upon the land. The grantor cannot keep the mortgage alive as a subsisting lien, for to do so would be in direct violation of his covenants.³³

§ 1969. Rights of Purchaser from Mortgagor of Mortgaged Premises—A purchaser of mortgaged premises from the mortgagor stands in his shoes, and is chargeable with notice of the mortgage and its legal effect. He merely succeeds to the rights of the mortgagor.

The holder of the equity of redemption should be made a party defendant to a foreclosure suit. His rights cannot be cut off unless this be done. But if he is not, the decree for foreclosure is not for that reason void. He is still the owner of the equity decree of redemption, and his rights remain unaffected by the foreclosure decree. The right, however, which thus remains unaffected is simply a right of redemption.

Inasmuch as the interest of the mortgagor or his grantee, who are not made parties to a foreclosure suit, is merely the right to redeem which is an equitable one, it must be asserted in a court of equity.³⁴

§ 1970. Assumption of the Mortgage Debt by the Grantee of the Mortgagor—It is a rule of law in the State of Illinois, that where a grantee in a deed conveying land upon which there is a mortgage securing an indebtedness, assumes and agrees to pay the mortgage debt as a part of the consideration for which the land is conveyed to him, he thereby becomes personally liable to the mortgagee for the payment of the debt, and is liable for any deficiency upon foreclosure of the mortgage and sale of the premises, or he may be sued at law by the mortgagee. His liability by such assumption is the same as if it were his individual debt, and a remedy may be had against him for the collection of the same.³⁵

33—*Brosseau v. Lowy*, 209 Ill. 405. 287; *Thompson v. Dearborn*, 107 Ill.

34—*Walker v. Warner*, 179 Ill. 16. 87.

35—*Ingram v. Ingram*, 172 Ill.

Where the promissory note is secured by a mortgage or trust deed, and the payment of the same is assumed by the subsequent grantee of the land, the executor of the deceased owner of such note may maintain an action in assumpsit, in his name, as executor, against the party so assuming such payment, notwithstanding the assumption clause sued upon is incorporated in an instrument to which the deceased was not a party.³⁶

§ 1971. Personal Liability of Party Assuming Mortgage Debt—An agreement contained in a deed that the grantee shall assume and pay a mortgage then existing on the land will impose an absolute personal liability on the grantee to pay the mortgage, if the deed were executed and delivered to him and accepted by him as a conveyance of the land. In case of such delivery to and acceptance by him, he would be bound in like manner as though he had signed the deed.³⁷

Where a third party, in consideration of a conveyance made to him, covenants and agrees to pay the notes secured by a mortgage on the property conveyed, he may properly be made a party defendant in a foreclosure proceeding to foreclose the mortgage, and a deficiency decree rendered against him for any deficiency resulting from a sale of the property.³⁸

Where one person makes a promise to another, based upon a valid consideration, for the benefit of a third person, such third person may maintain an action on the contract, and by virtue of this rule the purchaser of mortgaged premises who assumes the mortgage indebtedness as a part of the consideration for the conveyance to him becomes personally liable for such indebtedness and cannot defeat the mortgage right to hold him personally responsible by procuring a release from the mortgagor.

But these rules do not apply where the party sought to be held never acquired title to the mortgaged property, nor

36—*Harts v. Emery*, 184 Ill. 560. *Townsend v. Wilson*, 155 Ill. App.

37—*Merriman v. Schmitt*, 211 Ill. 303.

263; *Jones v. Foster*, 175 Ill. 459; 38—*Mead v. Peabody*, 183 Ill. 126.

received or accepted a deed of it. Although there may be a contract between the mortgagor and a third person for the sale or exchange of mortgaged lands, providing for the assumption of the mortgages, still so long as the contract remains unexecuted it may be cancelled by the mutual consent of the parties thereto, and no liability will be incurred to the mortgagee thereby.³⁹

§ 1972. Precise and Formal Words Unnecessary to Impose Liability for Debt Assumed—The rule to be gathered from the numerous holdings of the courts is, that where the amount of the mortgage is to be paid as a part of the purchase money, it is an assumption of the debt, and that precise and formal words are unnecessary to impose upon the grantee an engagement to pay off the mortgage; but the inquiry is to be as to what was the intention of the parties. It is a well established rule that where a party purchases premises which are incumbered to secure the payment of an indebtedness, and assumes the payment of the indebtedness as a part of the purchase money, the premises purchased are in his hands as a primary fund for the payment of the debt, and it is his duty to pay it. And the rule is the same, although there is no assumption of the payment of the indebtedness if the purchase is made expressly subject to the incumbrance, and the amount of the indebtedness thereby secured is included in and forms a part of the consideration of the conveyance.⁴⁰

§ 1973. Assumption of Mortgage Debt for Use and Benefit of Another, Binding on Such Third Party—If the grantee accepts the instrument and places it upon record, such acceptance of the deed with knowledge of its contents binds him as effectually the same as though the deed had been executed by him. And where the deed is made to one party, but in fact for the use and benefit of another, with the knowledge and consent of such other party by which

³⁹—Hartman v. Pistorius, 248 Ill. 568.

⁴⁰—Brosseau v. Lowy, 209 Ill. 405.

the grantee assumes and agrees to pay the incumbrance on the land, such assumption by the grantee is binding on the party for whose use and benefit the deed is made, especially if the beneficiary has knowledge of such assumption and he consents thereto; in such case he is personally liable therefor.⁴¹

§ 1974. Vendee Assuming a Mortgage Debt Estopped from Denying Its Validity—Where the purchaser obtains lands by recognizing a mortgage as an existing lien, and assuming its payment as a part of the purchase money, he is estopped from denying its validity, such as setting up the fact that his vendor, in making the mortgage, did not release his homestead estate or the want of consideration for the debt. To permit him to do so would be to permit him to practice a fraud on his vendor and the mortgagee.⁴²

While there are authorities which sustain the proposition that where a party takes a conveyance of land subject to a mortgage and agrees to pay the same he cannot set up a defense which the grantor may have had to such indebtedness, because the conveyance is an affirmation of the mortgage debt by the grantor, but where the evidence fails to show that the grantor set apart the lands for the payment of the debt nor the conveyance of them to the grantee that they were to be used by him for the payment of the debt, or under such circumstances as that he must be held to have assumed the payment thereof, and thereby precluded from setting up such a defense. Where there is no agreement or understanding as to the assumption of the mortgage debt by the grantee of the mortgagor he will have the right to set up such a defense. Under such circumstances the grantee assumes no burden or obligation to pay the debts of the grantor, especially one that is illegal; and by accepting the title he does nothing to estop himself from

⁴¹—*Gage v. Cameron*, 212 Ill. 146.

⁴²—*Pidgeon v. School Trustees*, 44 Ill. 501; *Lang v. Dietz*, 191 Ill. 161.

protecting the property from an unjust and invalid claim.

So a voluntary conveyance by a husband to his wife for the purpose of protecting the property of the husband against further depredations by the husband, who is a spendthrift and incapable of taking care of his property, his wife is not prohibited from showing that the mortgage debt was usurious.⁴³

§ 1975. Knowledge and Consent of Grantee Essential to Validity of Assumption Clause—Although there may be inserted in a deed an assumption of a mortgage debt on the premises by the grantee, yet if such clause is inserted without the knowledge or consent of the grantee, and the deed never accepted by him, the assumption clause will not be binding on him. Such a clause, like other contracts, must be based upon a sufficient consideration and if a conveyance is made purely as a mortgage, for the purpose of securing an indebtedness, that fact alone would not furnish any consideration for a promise to pay a previous mortgage. If the grantee takes only a mortgage interest he owes no debt which he can promise to pay to a prior mortgagee, and an agreement to assume a prior mortgage amounts to nothing but a promise to pay the debt of the mortgagor upon no consideration. But the grantor may prove that the deed, though absolute on its face, was intended only as a mortgage, and that it was never delivered or accepted by him as a conveyance of the land, and there never was in fact an agreement on his part to pay the incumbrance. It is only by acceptance that he becomes bound, and if the acceptance of the terms of the deed may be presumed from the fact that it is found on the public records, it would clearly not be a conclusive presumption, otherwise an obligation might be imposed upon a party without his knowledge or consent simply by making a conveyance and placing it upon the records.⁴⁴

⁴³—*First National Bank v. Drew*,
226 Ill. 622.

⁴⁴—*Merriman v. Schmitt*, 211 Ill.
263.

§ 1976. Contractual Agreement Necessary to Impose Obligation to Pay Mortgage Debt—A deed which is made merely subject to a mortgage specified in it, does not render the grantee personally liable for the mortgage debt. To create such a liability there must be something in the nature of a personal, contractual obligation which amounts to an agreement on the part of the grantee to pay off the incumbrance. Where there is no one before the court who is personally liable for the debt, it would be error to render a personal decree. In such a case there can only be a decree *in rem*, and the proper form is to find the amount due to the mortgagee, and to order the mortgaged premises sold, unless the amount found due is paid within a time limited by the decree.⁴⁵

The mere purchase of land does not render a purchaser liable for an incumbrance upon it, and an obligation on his part to pay it can only arise from his contract, either expressed or implied by law from circumstances.⁴⁶

Where the creditors of a mortgagor agree to accept the mortgaged property in discharge of their debts, and the matter is consummated by a deed by the mortgagor to a trustee for the benefit of the creditors, in which it is stated merely that the deed is made subject to the mortgages, neither the trustee nor the creditors will be held to be personally liable to the mortgagees for the amount thereof.⁴⁷

§ 1977. Nature of Mortgage Debt Assumed—Although the notes secured by a mortgage or trust deed may not be signed by the maker of the mortgage or trust deed, but by a third party, this does not affect the assumption by the grantee of the mortgaged premises of a portion of such indebtedness, as a part of the purchase price thereof.⁴⁸

§ 1978. Effect of Acceptance and Adoption of Deed Containing Assumption Clause—It is well settled by the deci-

45—Crawford v. Nimmons, 180 Ill. 143.

46—Scholten v. Barber, 217 Ill. 148.

47—Ray v. Lobdell, 213 Ill. 389.

48—Harts v. Emery, 184 Ill. 560.

sions of the courts, that where a party accepts and adopts a written contract, even though it is not signed by him, he shall be deemed to have assented to its terms and conditions and to be bound by them. The delivery of a writing and its acceptance and adoption by the party to whom it is delivered are necessary facts dehors the writing itself, and must, therefore, be proved by extrinsic evidence; and where mutuality is established by proof of the acceptance of the writing, the contract is, notwithstanding such resort to parol evidence, a contract all of which is in writing. Where the writing on its face purports to be a consummated contract, the mere acceptance and adoption of the writing establishes mutuality, and makes the contract binding on both parties. And there is no reason why, if there be a breach of the contract on the part of the party not signing it, it cannot be enforced against him, even though it is not signed by him.⁴⁹

§ 1979. Terms of Assumption of Mortgage Debt—Where a grantee assumes an incumbrance upon the property conveyed, the use of the word “assume” is the same as though the parties had instead used the expression “assumes and agrees to pay,” and imposes a personal liability upon the grantee to pay the incumbrance in question.⁵⁰

§ 1980. Vendee Assuming Mortgage Debt Not Liable Beyond the Terms of His Agreement—Where a grantee of mortgaged premises assumes the payment of the mortgage debt at a specified rate of interest, he cannot be held liable for a higher rate than that specified in the assumption, although the notes which the mortgage secures bears a higher rate of interest.⁵¹

Where a mortgagor executes a deed to his mortgagee, not as an absolute conveyance but as additional security, the grantor will not be liable to pay the second mortgage, al-

49—Frothman v. Deters, 206 Ill. 159.

50—Thomas v. Home M. B. L. Assn., 243 Ill. 550.

51—Hicks v. Elwell, 129 Ill. App. 561.

though the payment of the second mortgage by the grantee is recited as a part of the consideration for the conveyance. The grantee in a deed may always show what the actual consideration for the conveyance was, even though it may contradict the recitals in the deed.⁵²

§ 1981. Ejusdem Generis—Special Words Confined to the Same Sense as General Words—A deed conveying real estate, after the description of the property, contained this clause: “subject, however, to existing mortgages, liens, taxes and claims of any and all descriptions, which the party of the second part assumes and agrees to pay.” It was contended by the grantee that the words “and claims of any and all descriptions” should be construed in connection with the preceding words, “existing mortgages, liens and taxes,” under the maxim ejusdem generis and should be restricted to a sense which would be analogous to these general words of “existing mortgages, liens and taxes.” In other words the rule of construction that, when general words follow particular words, the former can only mean things or persons of the same kind or class as those which are particularly mentioned.

In commenting on this position of the grantee the court substantially says that in defining the maxim ejusdem generis, and applying it to the construction of statutes and contracts the cases decided by the courts are all cases where the word “other” is used to qualify general terms, which follow the specific description. And the court cites a number of cases illustrative of this fact. In the case under consideration the word “other” nowhere appears qualifying the general clause after setting forth the specific words. In this respect the case differs from the cases cited, where application has been made of the maxim ejusdem generis.

Again, it is said that where an enumeration of specific things is followed by general words or phrases, the latter are held to refer to the same class or kind as those qualified,

52—Huedsch v. Scheel, 81 Ill. 281.

is only one of the many rules of construction which are employed to ascertain the intent of the legislature, or the contracting parties, as expressed in the statute or contract sought to be construed. And where, from the whole instrument, a larger intent is to be gathered, the rule under consideration will not be applied in such a manner as to defeat the larger intent, or the rule will not be applied where from the whole statute or contract a larger intent may be gathered, if the application of the rule would defeat such larger intent. And this position is sustained by the citation of authorities.

And then again, the restriction of general laws to things ejusdem generis must not be carried to such an extent as to deprive them of all meaning. So, if the particular words exhaust a whole genus, the general words must refer to some other class. (Citing authorities.)

The maxim ejusdem generis must yield to another equally salutary rule of construction, viz., that every part of a statute or contract should, if possible, be upheld and given its appropriate force. (Citing authorities.)

While the mortgages, liens and taxes in the assumption clause are not specifically mentioned, parol evidence would be permitted to show what mortgages and other items were assumed by the grantee; and for a like reason parol evidence would be allowed to show what claims were embraced in the words of the assumption. It is to be presumed that these claims, mortgages, liens and taxes were assumed as a part of the consideration for the conveyance, and it is always permissible to introduce parol evidence to show the real consideration for the deed.⁵³

§ 1982. Parol Assumption of Mortgage Debt Enforcible—A verbal promise to pay an existing mortgage debt as a part of the purchase money of the mortgage premises is an assumption of the mortgage debt, and may be enforced by the grantor or the holder of the mortgage.⁵⁴

53—Gage v. Cameron, 212 Ill. 146.

54—Lang v. Deitz, 191 Ill. 161.

A purchaser may assume a mortgage indebtedness according to the terms of the mortgage without it being so expressly provided in the deed of conveyance, but in the absence of a written assumption the evidence must be clear and show that the assumption was in fact made.⁵⁵

§ 1983. Parol Evidence Admissible to Show Identity of Debt Assumed—If the identity of the mortgage assumed by the grantee is left in doubt by the terms of the assumption in the deed, the identity may be shown by parol evidence.⁵⁶

§ 1984. Pleading the Assumption of the Mortgage Debt—But to enforce such a liability it must be alleged either that the purchaser signed and sealed the deed, or that the deed had been delivered to him and he had accepted it. A contract to assume an indebtedness on land is not one of the essential parts of a deed of conveyance—in fact, such a contract is a stranger to a deed, and when a complainant in a bill undertakes to bind the purchaser by an averment, he should, in some way, allege the making of a contract between the grantor and the purchaser under which the latter would be bound to pay and discharge the mortgage indebtedness. The mere fact that the grantor executed and acknowledged a deed and inserted therein a clause that the grantee should pay the mortgage named in the deed would not create a personal liability on the part of the grantee to do so. In order to make the assumption clause in the deed binding on the grantee it is necessary to show that he consented to that clause being inserted in the deed. This may be done by showing that he signed and sealed the deed, or that it was delivered to him and he accepted it. If he accepts the deed, his assent to all it contains may be inferred in like manner as if he had signed and sealed the instrument.⁵⁷

55—*Assets Realization Co. v. Heiden*, 215 Ill. 9.

57—*Thompson v. Dearborn*, 107 Ill. 87.

56—*Webster v. Fleming*, 178 Ill. 140.

But an averment in a bill of foreclosure that a grantee has "assumed and agreed to pay" the indebtedness secured by a mortgage or trust deed is but an averment of a conclusion and not a sufficient averment of a fact on which to base a deficiency decree against him. It would seem to be necessary to allege the execution and delivery of the deed to the grantee and its acceptance by him.⁵⁸

§ 1985. Party Assuming Mortgage Debt Principal Debtor—As between the grantor and the grantee, in the conveyance of mortgaged lands, the grantee becomes the principal debtor and the grantor and mortgagor becomes his surety. This is the rule of law in Illinois.⁵⁹

§ 1986. Mortgagor Not Relieved from Liability by Assumption of Debt by Vendee—In a deed by the mortgagor to a third party in which the grantee assumes and agrees to pay the mortgage debt gives the mortgagee an additional remedy against such grantee by an action at law upon his assumption in the deed, but does not of itself relieve the mortgagor from his liability on the notes.⁶⁰

§ 1987. Mortgagor and His Grantee Both Liable to Mortgagee for the Mortgage Debt—The mortgagor and his grantee who assumes the payment of the incumbrance upon the property conveyed are both liable as principal debtors to the mortgagee unless the mortgagee has released the mortgagor from his liability and has agreed to look solely to the grantee of the mortgagor for the payment of the mortgage debt.⁶¹

§ 1988. Successive Grantees Assuming Mortgage Debt Liable Therefor—The principle applied between the mortgagee of the land and the grantee assuming the payment of the mortgage applies equally after the title to the land has passed to another grantee or to a series of grantees.

58—Kreidler v. Hyde, 120 Ill. App. 505.

60—Hazle v. Bondy, 173 Ill. 302.

61—Webster v. Fleming, 178 Ill.

59—Thomas v. Home M. B. L. Assn., 243 Ill. 550; Scholten v. Barber, 217 Ill. 148.

140.

The holder of the mortgage may sue a subsequent grantee, or any number of subsequent grantees, provided he can show in each case the elements essential to sustain an action against the first grantee, as that he assumed the payment of the mortgage; that his immediate grantor was liable, where such liability is essential. It may thus happen that the last grantee, in a series of grantees, becomes liable when the first grantee was not, for the reason that the last grantee assumed the mortgage, which the first grantee did not assume. Each subsequent purchaser of mortgaged premises, who, in the deed to him, assumes the payment of the mortgage debt, becomes an original promissor for the payment of the same and accepts the place of the original mortgagor.⁶²

§ 1989. Mortgagee Not Affected by Assumption Clause in Deed—But the mortgagee is in no wise affected by the agreement to which he was not a party. He may disregard it and bring his action against the original debtor, or he may accept the promise made for his benefit, and, treating it as an additional remedy, bring his action against the grantee. If the agreement is accepted by the mortgagee, each party is an original promissor for the payment of the incumbrance, but the contract rights of the mortgagee cannot be changed by any agreement between the mortgagor and his grantee unless the mortgagee agrees to such change.⁶³

The assumption of portions of the mortgaged indebtedness by the purchaser of portions of the premises mortgaged has no effect to discharge the lien of the mortgage upon all or any of the lots described in the mortgage or trust deed, by force merely of the agreement of the assumption between the various purchasers and the mortgagor. The lien in favor of the mortgagee cannot be discharged or affected by any agreement between mortgagor and one to

62—*Blakeslee v. Holt*, 116 Ill. App. 83.

63—*Scholten v. Barber*, 217 Ill. 148.

whom he may dispose of his interest in the mortgaged premises. In such case the mortgagee might restrict or apportion the lien of his mortgage in accordance with such agreements of assumption, if all the parties interested in the mortgaged property should consent thereto.⁶⁴

§ 1990. Remedy of Mortgagor Against Party Assuming Mortgage Debt—Where the vendee of mortgaged premises assumes the payment of the mortgage debt the mortgagor may proceed in equity to compel such vendee, to whom he stands in the situation of a mere surety, to discharge the debt for the protection of the vendor. And the vendor may likewise proceed against the vendee of his vendee, where notice is given.⁶⁵

§ 1991. Extension of Time of Payment by Mortgagee, After Assumption of Mortgage Debt by Vendee, Discharges Mortgagor—If the vendee of a mortgagor assumes the payment of the mortgage debt as a part of the consideration for the conveyance to him, and the vendee obtains from the mortgagee an extension of the payment of the mortgage debt, this will discharge the mortgagor from any personal liability to the mortgagee.⁶⁶

§ 1992. Statute of Limitations as a Defense by Party Assuming Mortgage Debt—Although the statute of limitations might be pleaded by the maker of a promissory note secured by a mortgage, yet as to subsequent grantee of the mortgaged premises, who has assumed the payment thereof, or a portion thereof, as a part of the consideration for the conveyance to him, and payments made by him, he having the legal right to pay the incumbrance and remove the lien, and thus discharge the obligation resting on him by reason of his assumption, prevents the running of the statute of limitations as against him.⁶⁷

64—Reed v. Jennings, 196 Ill. 472.

67—Harts v. Emery, 184 Ill. 560.

65—Gage v. Cameron, 212 Ill. 146.

66—Union Ins. Co. v. Hanford, 27 Fed. 588.

§ 1993. Conveyance by Mortgagor to Mortgagee in Satisfaction of Debt—It is well settled in Illinois that a mortgagor may convey his equity of redemption to the mortgagee, and invest him with an absolute title to the premises. So, where after the maturity of a note and mortgage, the mortgagor executes a deed of the premises to the mortgagee, and puts him in possession thereof, and he retains possession for a number of years and pays the taxes with the knowledge of the grantor, these facts will be strong proof that the deed was an absolute one and intended as a satisfaction of the mortgage debt.⁶⁸

§ 1994. Inadequacy of Consideration Immaterial in Transfer from Mortgagor to Mortgagee—Whether the property conveyed by the mortgagor to the mortgagee in satisfaction of a mortgage debt is worth more or less than the mortgage debt is not to be regarded as a controlling fact where the deed was made after due deliberation by the grantor, and no deception, fraud or oppression was used by the grantee in obtaining such deed. Where property is obtained under such circumstances, although its full value may not be paid, the conveyance must be sustained.⁶⁹

And the mere inadequacy of the consideration will not, of itself, deprive such an agreement of its binding effect.⁷⁰

§ 1995. Conveyances from Mortgagor to Mortgagee Regarded with Jealousy by Courts of Equity—A bona fide agreement may be made between the mortgagee and the mortgagor by the terms of which the rights of the mortgagor to redeem may be extinguished and the entire estate vested in the mortgagee. But such an agreement for the extinguishment of the right of redemption will never be sustained unless the transaction is fair, and unaccompanied by any oppression or fraud, or undue influence. A court of equity will never allow a mortgagee to avail himself of his position to obtain an advantage over the mortgagor.

68—Hart v. Randolph, 142 Ill. 521.

70—Scanlan v. Scanlan, 134 Ill.

69—Rue v. Dole, 107 Ill. 275.

630.

By securing such an agreement over the mortgagor by securing such an agreement for the extinguishment of the equity of redemption. Such contracts are always regarded with jealousy by courts of equity.⁷¹

But the jealousy with which such transactions are regarded by courts of equity should not be extended beyond the bounds of reason, so as to unnecessarily and unjustly interfere with the common business transactions of men.⁷²

§ 1996. Debt Extinguished by Deed from Mortgagor to Mortgagee—Where a mortgagor deeds the mortgaged property to the mortgagee in payment of the mortgage debt this operates as a satisfaction and extinguishment of the mortgage debt, and a release of the mortgage by the mortgagee in accordance with the understanding of both parties; the mortgagee does only what he was bound to do, and a conveyance by the mortgagee to a third party he conveys the property with the mortgage satisfied and discharged of the lien of the mortgage.⁷³

A deed absolute in form is, in law, presumed to be a deed until it is clearly proved to be a mortgage, and the fact that the deed is given by a mortgagor to the mortgagee, the debt cancelled and the mortgage released, and at the same time a contract of sale is given is evidence tending strongly to show an actual repurchase. If the conveyance extinguishes the debt and the parties so intended, so that a plea of payment would bar an action thereon, the transaction would be an actual sale notwithstanding the contemporaneous contract to reconvey on being reimbursed, within an agreed period, an amount equal to the debt and interest thereon.⁷⁴

§ 1997. Equity of Redemption in Mortgagor Subject to Sale on Execution—The equitable interest of a mortgagor in lands may be sold on an execution against him. There can be no doubt but that at common law, where it is held

71—*Cassem v. Huestis*, 201 Ill. 208.

73—*Novak v. Kruse*, 288 Ill. 363.

72—*Scanlan v. Scanlan*, 134 Ill. 630.

74—*Mann v. Jobusch*, 70 Ill. App. 440.

that the mortgagee holds the legal title to the land, and the mortgagor has only a mere equity of redemption, which under the common law was not subject to sale on execution; in fact, under the early common law no interest in real estate was subject to such a sale, not even the fee. But by the first section of the chapter on Judgments and Executions, a judgment was declared to be a lien on real estate, and real estate was defined to be all interest of the defendant, or any person to his use, or as mortgagor or mortgagee of lands or in fee, for life or for years, and thus in the plainest and most general terms rendered a mortgagor's interest, whatever it might be, liable to sale on execution. There is no reservation, limitation or exception. And the language naturally embraces a mortgage debt as well as all other classes of debts, which has been reduced to a judgment.⁷⁵

§ 1998. Condemnation of Mortgaged Premises—The mortgagee, by virtue of his mortgage, has a lien upon the entire premises described in the mortgage, and by a condemnation proceeding against a part thereof his equitable interest therein is not destroyed, and he, not being a party to the condemnation proceeding, his interest in the fund derived from the condemnation proceedings is equal to his lien on the mortgaged premises. His equity therein is superior to a subsequent judgment creditor of the mortgagor, and he is entitled to have the whole condemnation money paid to him.⁷⁶

In a proceeding to condemn a part of the mortgaged premises it is unnecessary for the mortgagee to execute a release for that portion of the property included in the proceeding because the condemnation proceedings removed the mortgage lien from the portion condemned, and the petitioner is not entitled to a release.⁷⁷

Where, in a condemnation proceeding, a judgment is

75—*Cottingham v. Springer*, 88 Ill. 90.

76—*Keller v. Bading*, 169 Ill. 152.

77—*Stopp v. Wilt*, 177 Ill. 620.

rendered against a part of the property described in a trust deed, one effect of such a judgment is to transfer the lien of the trust deed from the land to the fund awarded by the judgment, and no formal release is necessary from the trustee, and although the trust deed provides that the trustee shall not release any part of the premises unless a certain amount is paid, the fact that the trustee releases the property condemned upon the payment of the condemnation money, although the amount so received is less than the amount specified for a release, does not require that one maker of the trust deed shall be credited with the amount stipulated to be paid in the trust deed to authorize a release.⁷⁸

§ 1999. Extension of Time of Payment by Agreement Between Mortgagor and Mortgagee—It is competent for the mortgagee and mortgagor to contract for the extension of the time of payment of the obligations secured by a mortgage. But in order to establish a valid contract for the extension of the time of payment a definite contract to that effect must be established, founded on a valid consideration and fixing the time of the extension.⁷⁹

Such agreement will not affect the other terms of the mortgage. They still remain in force and are obligatory.⁸⁰

The presumption of law is that an extension of the time of payment on a promissory note was made by the trustee, where the trustee has the possession of the note, and that such extension was made with the knowledge and consent of the legal owner of the note, and where such endorsement is made on the note without being signed by the owner thereof, and payments of interest are made and received thereon thereafter, such payments may be regarded as evidence of the extension of the time of payment. If the legal holder of the note entrusts it to the trustee after its ma-

78—*Nix v. Thackerbury*, 240 Ill. 352.

79—*Amberg v. Nechtway*, 92 Ill. App. 608.

80—*Brockway v. McClun*, 243 Ill. 196.

turity, he is bound by the act of the trustee in extending the time of payment thereof, where the extension agreement has been acted upon by the parties.⁸¹

§ 2000. Extension of Time of Payment Usually in Writing—In providing for an extension of the time of payment of securities the payment of which is secured by mortgage, it is usual to reduce the agreement to writing to be signed by both parties thereto, and where such an agreement is signed only by the maker of the securities, the extension agreement is incomplete, and cannot be enforced.⁸²

§ 2001. Pleading and Proof of Extension of Time of Payment—The payment of interest in advance is a good consideration for an agreement to extend the time of payment of a promissory note. The endorsement of the payment of interest on a promissory note however, alone is not sufficient to establish the extension of the time of payment of a promissory note so as to release the surety or to release the lien of a trust deed or mortgage given by a third party to secure the payment of the promissory note. In order for the payment of the interest in advance to work a release of such surety of the lien of a mortgage, it is necessary to show that the payment of the interest in advance was made without the assent of the surety or the maker of the mortgage covered by the same, and was received by a party authorized to make the agreement for the extension of such payment, and the burden of proof is upon the party pleading the discharge to show these facts.⁸³

Although the proof may show an extension of the time of payment of a note, a failure to set that fact up affirmatively as a defense precludes the surety from taking advantage of the fact.⁸⁴

81—Kransz v. Uedelhofen, 193 Ill. 477.

82—Hide & Leather Bank v. Alexander, 184 Ill. 416; Hass v. Lobstein, 108 Ill. App. 217.

83—Prussing v. Lancaster, 234 Ill. 462.

84—Lancaster v. Prussing, 139 Ill. App. 33; Thulin v. Anderson, 154 Ill. App. 41.

§ 2002. Release on Margin of Record—Statute—“Every mortgagee of real or personal property, his assignee of record, or other legal representative, having received full satisfaction and payment of all such sum or sums of money as are really due to him from the mortgagor, and every trustee, or his successor in trust, in a deed of trust in the nature of a mortgage, the notes, bonds or other indebtedness secured thereby having been fully paid, shall, at the request of the mortgagor, or grantor, in a deed of trust in the nature of a mortgage, his heirs, legal representatives or assigns enter a release or satisfaction on the margin of the record of such mortgage or deed of trust in the recorder's office, which release or satisfaction shall be attested upon the margin of the record by the recorder of said county, and when so attested shall forever thereafter discharge and release the same, and shall bar all actions or suits brought or to be brought thereupon. All releases of mortgages and deeds of trust which have heretofore been made upon the margin of the record, in accordance with the provisions of this section, shall be held legal and valid, and shall have the same force and effect as if made under the provisions of this section as amended.”⁸⁵

Our legislature, at an early day, provided that where the mortgagor paid and satisfied the debt, and the mortgage had been recorded, he might compel the mortgagee to enter satisfaction of the mortgage on the margin of the record, which should operate as a discharge and release of the same, and forever bar all actions which might be brought thereon. This provision is found in the act establishing the recorder's office. (Laws of 1819, p. 19.) This was a most material modification of the common law rule, as it re-invested the mortgagor with the title simply by the mortgagee stating, over his signature, on the margin of the record, that he had received satisfaction of the debt,

and dispensed with a release or re-conveyance for that purpose.⁸⁶

§ 2003. Release of Mortgage by Deed—Statute—“A mortgage or trust deed of real or personal property may be released by an instrument in writing executed by the mortgagee, trustee or his executor, administrator, heirs or assignee of record and such instrument may be acknowledged or proved in the same manner as a deed for the conveyance of land.”⁸⁷

By sections 8 and 9 of chapter 95 of the Revised Statutes provision is made for the release of mortgages and trust deeds. By section 8 they may be released by the mortgagee or trustee, or his successor in trust, by entering satisfaction and release upon the margin of the record of the mortgage or trust deed and by section 9 it may be done by deed. It cannot be that it was the intention of the law that a release under one section of the statute shall have a different or greater effect than one under the other section. Both are to effect the same purpose—that is, to give public notice that the debt is satisfied. The purpose of the sections was the convenience in the transaction of business, and not that the consequences should be different.

Where a release is placed upon record, then under our recording act, the fact that it is recorded carries with it the legal inference, as to innocent third parties, that it was delivered.⁸⁸

§ 2004. Payment of Debt Releases Mortgage Ipso Facto—The mortgage and all the provisions thereof are to be regarded as for but one purpose, viz., the securing the payment of the mortgage debt; and when that debt is paid in full, the mortgage, together with all its terms and provisions, has expended its force, and the premises conveyed are no longer subject to its provisions, but are discharged therefrom.

86—*Cottingham v. Springer*, 88 Ill. 90.

88—*Havinghorst v. Bowen*, 214 Ill. 90.

87—Sec. 9, Ch. 95, R. S.

The reasoning of the Illinois courts is to the effect that the mortgage debt is the principle thing, and the mortgage is incident thereto, therefore, when the debt is discharged the provisions of the mortgage lose their force.⁸⁹

A trustee may, however, become the owner of a part of the debt secured by his trust deed, and when he does so become, he cannot be concluded as to that portion of the indebtedness of which he is the owner, by any agreement between the debtor and the holder of the remainder of the indebtedness to which he is not a party.

But the rule is that the demand of a creditor which is paid by the money of a third person, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, the debt is absolutely extinguished.⁹⁰

§ 2005. Revival of Mortgage After Payment Thereof—

It has been held that a mortgage which has been paid can, for a valuable consideration, be kept alive for other purposes, but it cannot be so done as against the rights of creditors, or third persons which have intervened; so where a mortgagor has conveyed his equity of redemption, and afterwards becomes possessed of a mortgage previously executed by him, he cannot infuse vitality into the mortgage by its re-issue, so as to affect the rights of his grantee.⁹¹

§ 2006. Parol Agreement Releases Mortgage—A parol release of a mortgage or accord and satisfaction of the notes as between the parties is plainly sufficient to discharge the indebtedness. And a payment or discharge of the debt secured by a mortgage operates as a release of the mortgage, which is but an incident to the debt.⁹²

§ 2007. Payment of Notes to Agent of Owner Thereof—It is well settled that authority to an agent to receive the

89—Carroll v. Haigh, 97 Ill. App. 576; Patterson v. Northern Trust Co., 230 Ill. 334.

90—Pearce v. Bryant Coal Co., 121 Ill. 590.

91—Lanphier v. Desmond, 187 Ill. 370.

92—Mutual Mills Ins. Co. v. Gordon, 121 Ill. 366.

payment of a debt is not, of itself, authority to do so before it falls due. But if there be a known usage of trade or course of business in a particular employment, or habit of dealing between the parties, extending the ordinary reach of authority, that may well be held to give full validity to the act. So, where a local agent had full authority from his non-resident principal to make loans on real estate, to use his own judgment, collect the principal at maturity or extend the time of payment, determine the length of loans, pass upon titles, pay taxes, make repairs, and, generally, to look after his principal's interests, without limitation in writing, will warrant the implication that the agent had authority to receive the payment of the note before its maturity, and release the trust.⁹³

§ 2008. Proper Party to Execute Release—The proper party to execute a release is the party to whom the papers run—the mortgagee in a mortgage or the trustee in a trust deed; if either of them be dead then under the statute the administrator of the mortgagee or the successor in trust of the trustee is the proper party to execute the release. The heir of the mortgagee is not a necessary party to such a release.⁹⁴

§ 2009. Release of Mortgage on Payment of Notes Before Maturity—It has been sometimes suggested that where the trust deed shows that the notes secured thereby were not payable at the time the release of the trust deed is executed, and that the land was not intended to be released from the trust till all the notes were paid, that parties dealing with the lands are negligent in not making inquiry into the fact whether they are still unpaid. But it is asked of whom should such inquiry be made. The trustee by his release has expressly asserted under his hand and seal that the notes have been paid. And where the original holder of the notes has parted with their possession, he

93—Thornton v. Lawther, 169 Ill. 228.

94—Citizens National Bank v. Dayton, 116 Ill. 257.

may not be able to give the desired information, and the maker of the notes is not likely to give information to his disadvantage. A party dealing with the property is not bound to inquire of any of them as to the fact of the payment of the notes. To charge such a party with constructive notice of the fact that the notes had not been paid, in the absence of proof of knowledge, fraud, or gross and wilful neglect on his part would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business.⁹⁵

§ 2010. Release of Part of Mortgaged Premises—A mortgagee has an undoubted lawful right to make a release of part of the premises and retain his lien on the remainder of the property for whole indebtedness if he so determines.⁹⁶

If the mortgagee releases a portion of the land mortgaged in order to enable the mortgagor to sell such portion free from incumbrance, such a release does not operate to discharge the indebtedness either in whole or in part. The debt remains the same and it may be recovered in an action at law.⁹⁷

If the mortgagee knows that portions of the mortgaged premises have been subsequently conveyed or incumbered, he is not allowed in equity to release those parts on which he has the only security and to enforce his entire claim upon those portions in which others have become interested and if he does release part, which is liable for the payment of his debt, he cannot charge the other portions of it without deducting the value of the part released.⁹⁸

It is well settled that a payment upon the mortgaged debt is an extinguishment, *pro tanto*, of the mortgage lien. And if the mortgagee, having notice of successive alienations by the mortgagor, of parts of the mortgaged premises, re-

95—*Havinghorst v. Bowen*, 214 Ill. 90.

96—*Hazle v. Bondy*, 173 Ill. 302.

97—*Edgington v. Hefner*, 81 Ill. 341.

98—*McCarthy v. Miller*, 122 Ill. App. 299.

leases a part thereof, liable for the mortgage debt, he cannot enforce the mortgage lien against the other portions of the mortgaged premises without first deducting the value of such parts of the premises which he has released. And when the mortgage is sought to be enforced against the owner of the parts conveyed by the mortgagor, such owner can claim an abatement of his liability to the extent of the value of the portion released and which should have been made liable for the primary fund. And relief in this regard can be afforded such junior mortgagee, purchaser or judgment creditor by way of answer, and a cross-bill is not necessary therefor.⁹⁹

If, however, the mortgagee can secure a part payment on the mortgage debt, by releasing a part of such remaining part of the property for the purposes of a sale, and by applying as a credit on the mortgage the full price of the property last sold, such release will not charge the mortgagee with more than the amount for which such property sold, unless the price was so grossly inadequate as to show a want of good faith. So long as the mortgagee acts in good faith, his right to make his money out of the mortgaged premises is not to be destroyed, or even impaired, for the sake of protecting the subsequent purchaser from the mortgagor.¹

§ 2011. Mortgage Released on Equitable Grounds—

Where a note secured by a mortgage is not due, and there is equitable grounds established for having the note cancelled, courts of equity will grant such relief.²

§ 2012. Consideration for Release—The mortgagee may accept less than the full amount in payment of the mortgage and execute a valid release. He may also accept some other good and valuable consideration, and a release of record upon such a consideration ought to be binding on

99—Boone v. Clark, 129 Ill. 466.

Ill. 397; Black v. Miller, 173 Ill.

1—Hawhe v. Snyder, 86 Ill.

489; Kingsley v. Kingsley, 130 Ill.

197; Ames v. Whitbeck, 179 Ill. 458.

App. 53.

2—Hodson v. Eugene Glass Co., 156

the parties and operate the same way as if full payment had been made.³

§ 2013. Description of Premises Released—A release of a mortgage of certain described premises will not be construed to release the mortgage upon other portions of the estate in which the mortgagor has, without the consent of the mortgagee, seen fit to create as against himself an easement as appurtenant to the lands described in the release.⁴

§ 2014. Fraudulent Mistaken or Improper Release of Mortgage—In the case of *Lannartz v. Quailty*, 191 Ill. 174, the Supreme Court consider the effect of a fraudulent release of a trust deed by the trustee. It appeared that the owner of a certain piece of property made a trust deed to secure an indebtedness of \$3,000, and subsequently made a trust deed to secure a second indebtedness of \$3,500. Before the notes secured by the second trust deed became due by their terms the husband of the owner induced the trustee in the second trust deed to execute a release, without the surrender of the notes secured thereby. The owner then sold the property making the deed subject to the first trust deed only. The husband paid the interest on the second incumbrance for some time after its release, but finally made default, and the owner of the notes filed a bill of foreclosure making the parties shown of record who were interested in the property defendants.

In commenting on this state of affairs the court says: "The release of the premises without payment of the debt did not discharge the lien as between the original parties, and would not discharge it as to a subsequent purchaser or mortgagee with notice of the breach of trust. The rights of appellant (the second incumbrancer) would be superior to any person chargeable with notice that the trust deed was released in violation of its terms. The public records

3—*McMillan v. McMillan*, 184 Ill. 230.

4—*Hyde Park T. H. Light Co. v. Brown*, 172 Ill. 329.

of conveyances and instruments affecting the title to real estate are established by statute to furnish evidence, of such title, and a purchaser may rely upon such records in security unless he has notice or is chargeable in some way with notice of some title, claim or conveyance inconsistent therewith. In this case there was no actual notice or knowledge but Johanna Quailty, the purchaser, acted in entire good faith and paid her money relying upon the record of the release * * * showing the payment and discharge of the lien.

Having no such knowledge, she had the right to rely upon the record unless there was something to put a reasonable person upon inquiry whether there was some infirmity in the release. The only ground for claiming that she was affected with notice that the release was fraudulent is the fact that the note to the appellant was payable on or before five years after date, and five years had not elapsed after its date. The payment of the note could not be enforced against the makers until the expiration of five years, when it would become due absolutely at all events. The makers of the note, however, reserved the right to pay it before the end of that period, so that, so far as they were concerned, the note was payable at any time. Presumably, they reserved that right in view of some expectation or probability that they would desire to exercise it. The note being payable at any time at the option of the makers, and the record showing that payment had been made and the trust deed regularly released, we do not see how it could be said that Johanna Quailty either presumed or suspected that the makers of the note had not exercised their right and option to pay it. It is to be remembered that Johanna Quailty was a purchaser whose only duty was to ascertain the condition of the title, and she was under no obligation or duty to see that the note was paid or cancelled. The recording laws are designed to afford protection to parties acting in good faith and relying upon them, and in the ab-

sence of any notice or ground of suspicion it is not the duty of the purchaser to obtain an admission of the payment from the holder of a note secured by a trust deed regularly released of record.⁵

A trustee in executing a release can only exercise the powers contained in the trust deed, and that is usually to execute a release on the payment of the indebtedness in compliance with the terms and conditions of the trust deed. So if the trustee unauthorized by the terms of the trust deed or the *cestui que* trust, executes a release, it will have no effect upon the deed of trust as between the original parties or as to subsequent purchasers with notice.⁶

Where a trustee releases a trust deed and receives payment of the debt without actual authority and without producing the securities, the party paying has notice of the want of authority and power on the part of the trustee. The inference of authority to receive the payment arising from the possession of the securities is founded upon such possession, and it does not exist without possession.⁷

Where a party makes a loan to a party who is insane at the time, and such fact is not known to the lender, who at the request of the borrower pays off a previous incumbrance secured by a trust deed, and causes such trust deed to be released, he may nevertheless have a foreclosure of the first trust deed upon the presumption that the release of the first trust deed was a mistake in fact, where no rights of third parties have intervened.⁸

A release of a trust deed by the trustee before the payment of the note secured thereby would be a breach of the trust by the trustee and would be unavailing to any one who had knowledge of the breach. But it would transfer the legal title. In equity, however, a release unauthorized

5—Lannartz v. Quality, 191 Ill. 174.

6—Reed v. Jennings, 196 Ill. 472.

7—Fortune v. Stockton, 182 Ill. 454.

8—Doxey v. Western State Bank, 113 Ill. App. 442.

by the terms of the trust, or by the *cestui que* trust, will have no effect upon the deed of trust, as between the original parties or third parties with notice.⁹

§ 2015. Fraudulently Marking the Securities as Paid Does Not of Itself Release the Mortgage—Where a mortgage or trust deed has been duly recorded, it must be held that all persons taking subsequent conveyances of the property are affected with notice of that fact, and any one examining the records would discover that it was not released, and was a subsisting lien on the property. The mere marking them as paid by an authorized person cannot operate as a release of the security, when the indebtedness secured was not in fact paid.¹⁰

§ 2016. Duty of Owner of Securities to Act Promptly on Learning of Fraudulent Release—Although the legal holder of the notes may not know of the improper release of the mortgage or trust deed securing them at the time it is executed, yet when this fact comes to his knowledge, it is his duty to take timely action to set it aside. If he fails to do so he is open to the charge of negligence and laches.¹¹

§ 2017. Failure to Release—Penalty—Statute—“If any mortgagee or trustee, in a deed of trust in the nature of a mortgage, of real or personal property, or his executor or administrator, heir or assigns, knowing the same to be paid, shall not, within one month after the payment of the debt secured by such mortgage or trust deed, and request and tender of his reasonable charges release the same, he shall, for every such offense, forfeit and pay to the party aggrieved the sum of \$50, to be recovered in an action of debt before a justice of the peace.”¹²

Section 10 of Chapter 95 of the Revised Statutes, being of a penal nature is strictly construed. A trustee is not required to determine disputed questions of law or fact,

9—*Mann v. Jummel*, 183 Ill. 523.

12—Sec. 10, Ch. 95, R. S.

10—*Schroeder v. Wolf*, 227 Ill. 133.

11—*Havinghorst v. Bowen*, 214 Ill.

and he is not liable for the penalty imposed by the section if he fails to do so.¹³

§ 2018. Remedies of the Mortgagee—After condition broken the mortgagee has several remedies which he may pursue, and all at the same time, but he can have only one satisfaction. He may (1) file a bill in chancery for the foreclosure and sale of the equity of redemption of the mortgagor; (2) or proceed at law by *scire facias* for the same purpose; (3) he may enter and take possession of the mortgaged premises peaceably or by ejectment and hold the same until the rents and profits discharge the debt; (4) he may sue the maker of the securities at law and recover judgment thereon; or if the mortgagor has conveyed the property, and the grantee has assumed and agreed to pay the mortgage debt, he may sue such grantee on his undertaking.¹⁴

§ 2019. Powers of Sale in Mortgages Abrogated—Foreclosure Provided—Statute—“That no real estate within this state shall be sold by virtue of any power of sale contained in any mortgage, trust deed or other conveyance in the nature of a mortgage, executed after the taking effect of this act but all such mortgages, trust deeds or other conveyances in the nature of a mortgage, shall only be foreclosed, in the manner provided for the foreclosure of mortgages containing no power of sale; and no real-estate shall be sold to satisfy any such mortgage, trust deed or other conveyance in the nature of a mortgage, except in pursuance of a judgment or decree of a court of competent jurisdiction.”¹⁵

Prior to the passage of this act it had become customary to insert in a mortgage or trust deed a provision that on the violation by the mortgagor of any of the covenants contained therein, then the mortgagee or trustee might pro-

13—Lane v. Frake, 70 Ill. App. 303.

15—Laws of 1879, p. 211.

14—Brown v. Schuitz, 109 Ill. App. 598.

ceed to sell all the right, title and interest of the mortgagor, including his equity of redemption, in the premises and on such sale immediately convey the premises to the purchaser thereof.

In the chapter on mortgages there are a number of provisions regulating the exercise of such power of sale, but as the foregoing enactment renders them of no effect they are omitted herefrom. Their inclusion would not add materially to the advantage of this work.

§ 2020. Nature of Proceeding to Foreclose in Chancery—The right of action by the mortgagee or legal holder of the note is independent of any remedy given him by filing his claim in the probate court, and a failure to so present his claim within the time limited by the probate statute will not, of itself, bar a right to foreclosure of a note and mortgage not otherwise barred. A proceeding to foreclose is not one against an estate nor is it one *in personam*. It is in the nature of a proceeding *in rem* to enforce a certain security specially set apart for the indemnity of the holder of the note. In a proceeding to foreclose a mortgage in chancery the decree ascertains the sum due and orders a sale of the specific property for its satisfaction.¹⁶

§ 2021. Foreclosure of Mortgage in Chancery—The usual and more ordinary method adopted by mortgagees, in modern times, to enforce their securities is by a bill in chancery to enforce the same. It is the more equitable and satisfactory proceeding in which the various equities between the proper parties may be adjusted, and has to a great extent superseded all other methods. There may be peculiar circumstances which render some other method desirable in certain cases, but such cases are now peculiar.

Unless it is made to appear affirmatively that a court of chancery has no jurisdiction in a foreclosure proceeding, in a court exercising common law and chancery powers,

¹⁶—*Waughop v. Bartlett*, 165 Ill. 124.

all presumptions will be indulged in which are necessary to sustain the jurisdiction.¹⁷

So long as the mortgage indebtedness exists and is enforceable as a binding obligation on the mortgagor, the mortgage securing the indebtedness may be foreclosed against the mortgagor and his assigns.¹⁸

Where the trustee in a trust deed, in the nature of a mortgage, is dead, and a proceeding is instituted in chancery to foreclose the trust deed, the appointment of a new trustee is entirely unnecessary. The services of a new trustee could not be utilized either by the holder of the note or the owner of the equity of redemption. In such case the better practice is to file a bill to foreclose, and on the entry of a decree require the master in chancery or a special commissioner to make the sale and execute the trust.¹⁹

§ 2022. Foreclosure on Overdue Interest Coupon—The holder of a coupon interest note after its maturity may maintain a bill for the foreclosure of the mortgage or trust deed securing the same, although there may be nothing in the instrument providing therefor. The holder of a note which is due is not required to wait until the other notes secured by the same mortgage are due, before he can take steps to enforce his security. To refuse to foreclose a mortgage for his debt as it matures, when payable in installments, would be to deprive him of his rights without his fault.²⁰

Where a mortgage or trust deed provides that in case of default in the payment of any installment of interest or any portion of the principal debt, the entire debt, at the option of the mortgagee, shall become due and payable, no particular form of expression is necessary to be used for the purpose declaring such option. Indeed, there are

17—Harrow v. Grogan, 219 Ill. 288.

18—Richey v. Sinclair, 167 Ill. 184.

19—Waughop v. Bartlett, 165 Ill.

20—Silverman v. Silverman, 189

Ill. 394; Boyer v. Chandler, 160 Ill.

394.

many authorities which hold that no formal notice is required; that the commencement of an action to foreclose the mortgage is sufficient to show the election of the mortgagee to declare the debt due.²¹

§ 2023. Foreclosure Proceedings Either in Personam or in Rem—If the proceedings be one in which it is sought to subject the defendants to the process of the court in order to determine their personal rights and obligations—in other words, strictly *in personam*—personal service upon the defendants within the jurisdiction of the court will be essential. But where the proceedings, as in case of a foreclosure of a mortgage, though personal in form, is substantially one *in rem* against the real estate covered by the mortgage and its sole object being to reach and dispose of the real estate by enforcing the lien of the mortgage, service by publication is amply sufficient for the purpose of procuring a decree of foreclosure.

The only object of such substituted service is to inform the parties interested in such real estate of the institution of the proceedings, and its nature and object.²²

A decree rendered against a party who is beyond the limits of the state upon constructive notice by publication, under our statute can only affect the property within the jurisdiction of the court. The person cannot be bound unless it has been reached by the process of the court. It is only where the jurisdiction of the person has been obtained by the service of process or by the voluntary appearance of the party in the progress of the case that a party is bound personally by the judgment rendered.²³

§ 2024. Courts of Equity Will Enforce Liens—The rule is perfectly settled in this State that a party may, by an express agreement, create a charge or claim in the nature of a lien on real as well as on personal estate, of which he is the owner or possessor, and that equity will establish

21—Heffron v. Gage, 149 Ill. 182.

23—Mosier v. Osborn, 284 Ill. 141.

22—Spitznagle v. Cobleigh, 120 Ill.

App. 191.

and enforce such charge or lien, not only against the party who stipulated to give it, but also against third persons who are volunteers, or who took the estate on which the lien is agreed to be given and who had notice of the stipulation. Such an agreement raises a trust which holds the estate to which it relates.²⁴

§ 2025. Power of Mortgagee to Declare Whole Sum Due on Breach of Covenants—Parties may by contract make the time, given for the payment of the principal debt, depend upon the prompt payment of the several installments of interest, when due, providing either in the note, or the mortgage securing the same, that a failure to make payment in any installment of interest shall work a forfeiture of credit, and make the entire debt due at once. Such stipulations, that the whole sum shall become due and payable upon default in the payment of the principal or interest is universally held to be legal and valid. It is not objectionable as being in the nature of a penalty or forfeiture, but will be sustained in equity as well as in law.²⁵

There is no reason why such an agreement may not be entered into, and the courts vested with ample power to enforce it.²⁶

§ 2026. Power to Declare Whole Sum Due Permissible Only—A provision in a note or mortgage that upon default in the payment of interest, the entire debt shall immediately become due and payable, is permissive only. It does not of itself cause the note to mature, so as to start the running of the statute of limitations.²⁷

§ 2027. Notice to Mortgagor of Intention to Declare Whole Sum Due Unnecessary—It is not necessary, as a general thing, to give the mortgagor or debtor personal notice of the intention to exercise the option to make the whole indebtedness to become due on a failure to pay the interest.

24—Gage v. Cameron, 212 Ill. 146.

25—Curran v. Houston, 201 Ill.

442; King v. King, 215 Ill. 100;

Terry v. Eureka College, 70 Ill. 236.

26—Niccols v. Peninsular Stove

Co., 48 Ill. App. 317.

27—Watts v. Hoffman, 77 Ill. App.

411.

The exercise of the option is indicated by the filing of the bill to foreclose. The determination of the holder of the notes to file a bill of foreclosure, and causing the same to be prepared and filed in pursuance of such determination, is a sufficient election to declare the whole sum due, and to entitle him to maintain his bill.²⁸

§ 2028. Waiver of Declaration of Whole Sum Due—A Question of Fact—The legal holder and owner of a note and mortgage or trust deed securing the same, and which contains a provision permitting him to declare the whole amount of the indebtedness to be due on the default in the payment of any installment of interest, having elected to so declare, may afterwards waive such election, and permit the note and trust deed or mortgage to remain in full force. It is true that under some circumstances the law will not permit a party having once elected to change such election, but will hold it irrevocable. This rule, however, is generally applicable in cases where the opposite party would be in some way prejudiced, by permitting him who has the right of election, to revoke such election.

In cases, however, where the mortgagee or trustee, for his only exclusive benefit or convenience, has taken a contract which assures to him the right, upon the failure of the payment of interest, or the violation of the other covenants in the instrument, to declare a forfeiture and hold the entire sum due and payable, there are none of the conditions which he has not a perfect right to waive; and he may waive his election, and permit the contract of indebtedness to continue under its original terms.

After the legal holder of the note secured by a mortgage has declared the whole amount of the indebtedness to be due, by reason of the violation of any of the covenants in the mortgage or trust deed, the mere acceptance of interest by him will not of itself revive the contract, as one

28—Curran v. Houston, 201 Ill.
442; Van Vlessengen v. Lenz, 171 Ill.
162.

may accept payment of part of the indebtedness due him, without thereby waiving his right to receive the balance. Where, however, one does so accept the installment of interest, it becomes a question of fact whether he thereby waived the election.²⁹

§ 2029. Allegations in Bill as to Declaring the Whole Sum Due—Where there is no allegation in the bill that the mortgage provides that the debt may be declared due for a breach of any of the conditions of the mortgage, and a copy of the trust deed is not attached to the bill as an exhibit, and the allegations in the bill are merely conclusive of the pleader in that regard, the bill is obnoxious to a demurrer if filed before the time of the maturity of the note as shown by the bill.³⁰

§ 2030. Allegations and Proofs Must Correspond—Where the facts proved do not support the allegations of the bill the complainant cannot have any relief upon grounds not alleged in the bill.³¹

It may be shown by the defendant that a decree entered *pro confesso* that it was not justified by the allegations of the bill.³²

§ 2031. Maker Not in Default, Bill Prematurely Filed, and Should Be Dismissed—Where the note and the mortgage contain a provision that if default be made in the payment of any installment of interest after it becomes due, the legal holder of the note might elect to treat the principal sum, together with the accrued interest, as due and payable, and proceed to the foreclosure of the mortgage, if the maker of the instruments is not in default in the payment of the interest, a bill filed to foreclose the mortgage on account of such default is prematurely filed and should be dismissed.³³

29—Van Vlissingen v. Lenz, 171 Ill. 162; Curran v. Houston, 201 Ill. 442.

30—Jocelyn v. White, 201 Ill. 16.

31—McGooden v. Bartholic, 132 Ill. App. 392.

32—Armstrong v. Douglas Park Building Assn., 176 Ill. 298.

33—Bartholf v. Bensley, 234 Ill. 336.

§ 2032. **Suit for Use of Beneficiary**—The general rule in equity is, that the holder of the equitable title must bring the suit for its enforcement. But where a suit for the foreclosure of a mortgage is prosecuted by one for the benefit of another, with his knowledge and consent, the adjudication therein will be binding on such beneficiary, not only as to what matters were determined therein, but as to all matters which were properly involved therein, and which might have been prosecuted and determined therein.³⁴

§ 2033. **Bill of Foreclosure—Form and Substance**—The general requisites of a bill of foreclosure are, that it should allege the execution and delivery of a mortgage and the note or bond secured by it; when and where recorded; a description of the premises; the amount claimed to be due, and the default upon which the right of action is based. It must show, also, that the complaint is entitled to maintain the action, and that the defendants have, or claim to have certain interest in the property or liens upon it. If the complainant is not the mortgagee his right to maintain the action by virtue of an assignment, bequest or otherwise, must be set forth with reasonable fullness and certainty. The terms and conditions of both the mortgage and the note or bond secured by the mortgage should be fully set out. This may be done either by recitals in the bill itself, or by annexing copies of the instruments which are referred to in the bill and made parts of it. In stating deeds or other written instruments it is the common practice to refer to them in such words as: "As in and by said indenture, reference being thereunto had when produced, will more fully and at large appear." The effect of such a reference is to make the whole document referred to a part of the record. It does not make it evidence. In order to make a document evidence it must be proved if not otherwise admissible. But the effect of referring to it in the bill is to enable the complainant to rely upon it and upon

34—*Cheney v. Patton*, 134 Ill. 422.

every part of the instrument, and to prevent his being precluded from availing himself, at the hearing of any portion either of its recitals or operative parts, which may not be inserted in the bill, or which may be inaccurately set out. Thus it seems the complainant may by his bill, state simply the date and general purpose or purport of any particular deed or instrument under which he claims, and that such statement, provided it is accompanied by a reference to the deed itself, will be sufficient.

But it is to be noticed that in a demurrer to the bill the complainant cannot avail himself of that portion of the instrument not set out. So the rule is understood to be that if the complainant relies upon a written instrument, and has so described the instrument to identify it, and then by apt words specifically refers to the instrument, he may, if demurrer be not interposed, upon the trial of the case have the benefit of the instrument and all its provisions; but if the bill, on its face and in apt terms, does not contain all the allegations necessary to show him to be entitled to the relief prayed, the bill will be obnoxious to a demurrer, and if the bill be not demurred to, but answered or default made, and the instrument so referred to, when offered in evidence, shows the right of the plaintiff to his relief, then in such case the bill will be sufficient to support the decree.

In most works on pleadings and practice in chancery the forms given suggest the making the notes and mortgage exhibits to and parts of the bill and attaching copies thereof; but the court was unable to find where any court of appeal in any state where the chancery practice obtains as it existed in England, and unaffected by codes, which has held that a failure to attach a copy of the notes and mortgage to the bill as exhibits renders the bill obnoxious to a demurrer. It is doubtless the better practice to do so, but that reason does not make the bill demurrable because it is not done.³⁵

35—*Jocelyn v. White*, 201 Ill. 16.

In stating deeds or other written instruments in a bill it is usual to refer to the instrument itself, in some such words as the following: "As by the said indenture, when produced, will appear." The effect of such reference is to make the whole instrument referred to a part of the record. The effect of referring to it is to enable the complainant to rely upon every part of the instrument, and to prevent his being precluded of availing himself of any portion, at the hearing, either of its recitals or operative parts which may not be inserted in the bill. Thus, it seems, a complainant may, by his bill, state simply the date and general purport of any particular deed or instrument under which he claims, and that such statement, provided it is accompanied with a statement or reference to the deed itself, will be sufficient.³⁶

The reference to the mortgage is also frequently made as follows: "A copy of which mortgage is hereunto attached and marked 'Exhibit —,' which is hereby made and prayed to be taken and considered as a part hereof, the same as though here set out in full."³⁷

§ 2034. Possession of Notes by Mortgagee Evidence of Non-Payment—The possession of the notes secured by a trust deed by the payee or his administrator is *prima facie* evidence that the notes are still due and unpaid, and the burden of proof is upon the party claiming them to be paid.³⁸

§ 2035. Lien of Mortgage Not Affected by Death of Mortgagor—The death of the mortgagor could not in any way affect the lien of the mortgage, nor would the fact that the holder of the note filed or neglected to file his claim in the probate court in any manner affect it. The right to file and have allowed a claim of this character under the statute relating to the administration of estates, is only an

36—Loewenstein v. Rapp, 67 Ill. App. 678.

38—Steinmetz v. Lang, 81 Ill. 603.

37—Cheltenham Imp. Co. v. Whitehead, 128 Ill. 279.

additional remedy afforded the holder of the note secured by a real estate mortgage, and where he may desire to secure a judgment over any deficiency which may result after the sale of the specific property in which he has a lien or where he may desire to hold liable a surety on the note. The mortgagee's right to a prompt foreclosure of his mortgage is not to be in any manner impeded by compelling him to resort to any personal remedy. If he desires any judgment for a deficiency, or recourse to any security not specifically pledged, he must proceed within the time limited, in conformity with the statute.³⁹

The death of a defendant in a foreclosure suit does not abate the suit as in an action at law, but merely to suspend further proceedings. And section 39 of chapter 77 of the revised statute has no application to a foreclosure proceeding. That section only applies to decrees for the payment of money, that is, to personal decrees against the defendant of the payment of money. A decree of foreclosure is not such a decree.

Where the defendant in a foreclosure suit dies after decree and before a sale thereunder, if his heirs think there is error in the proceeding their remedy is by way of an original bill in the nature of a bill of review, and not by petition in the foreclosure suit.⁴⁰

§ 2036. Parties to a Foreclosure Proceeding—The ordinary rules of chancery practice applicable to parties to the suit apply to a proceeding in equity to foreclose a mortgage; but there are some features in regard to parties to such suits which are peculiar to foreclosures, and they will be considered here.

It is essential that all persons interested in the premises should be made parties to a bill of foreclosure either as complainants or defendants, so that they may be concluded by any decree which may be entered therein. The failure

39—*Waghop v. Bartlett*, 165 Ill. 124.

40—*Kronenberger v. Heinemann*, 104 Ill. App. 156.

to make such a person a party to the suit might affect the price at which the property would sell at the foreclosure sale. A party desiring to bid at the sale would likely be deterred from bidding if there were a party not bound by the decree, and if such party did bid at all, it would likely be less than he otherwise would. As the mortgagor is entitled to any surplus arising from the sale it is his right to have the property sold at the best price obtainable.⁴¹

§ 2037. Party Complainant—It is a well established rule in equity that the equitable owner of the interest involved is the proper party to commence the proceeding.

The mortgage confers, not upon its holder, but upon the holder of the debt, the right to resort to the property for its payment; the right to foreclose can only be asserted under the debt. But so long as the debt is alive and an action could be brought on the note, the owner of the note can maintain a foreclosure of the mortgage.⁴²

The legal owner and holder of the notes secured by a mortgage or trust deed may file a bill in his own name for its foreclosure.⁴³

The possession of promissory notes by a stranger to them, which have been duly endorsed in blank, is prima facie evidence of title to them and creates a presumption that they were in fact acquired in good faith, for value, before maturity, in the usual course of business and without notice of defects in the title.⁴⁴

Where the note secured by a mortgage is payable to the order of the maker and he delivers it with the mortgage to a party, it is a matter of no difference in equity, whether the maker endorses the note or not; the delivery of them to the complainant is an equitable assignment of the note, and that would enable the complainant to institute and

41—*Gale v. Carter*, 154 Ill. App. 478. *tenham Imp. Co. v. Whitehead*, 128 Ill. 279.

42—*Holroyd v. Millard*, 142 Ill. App. 392. 44—*Kittler v. Studebaker*, 113 Ill. App. 342; *Mann v. Merchant's L. &*

43—*Dorn v. Colt*, 180 Ill. 387, *Chel-* *T. Co.*, 100 Ill. App. 224.

prosecute a suit in equity for the foreclosure of the mortgage, in his own name.⁴⁵

Where the mortgagee is dead and his estate closed the presumption is that his widow and children are the equitable owners of the note and mortgage, and being the equitable owners there is no reason why they may not sustain a bill for the foreclosure of the mortgage. It is not necessary that the administrator of the estate, who has been discharged, should be made a party complainant.⁴⁶

The former rule requiring the heirs of a deceased mortgagee to be joined with the administrator in proceedings to foreclose a mortgage rested upon the ground that the heir was the only person who could recover the legal estate to the mortgagor. The statute of Illinois having now provided that a mortgage may be released by the executor or administrator of the deceased mortgagee, the reason for the rule no longer exists and the heir of the deceased mortgagee is not a necessary party with the administrator in a proceeding to foreclose the mortgage.⁴⁷

Where the mortgagee is dead his personal representative is the proper party to foreclose the mortgage, for the reason that the money secured belongs to the personal assets, and draws to it the mortgaged estate as an incident. The heirs of the deceased mortgagee before a foreclosure and an entry for condition broken have no interest in the premises and are not necessary parties to a bill by an administrator to foreclose the mortgage.⁴⁸

Where it is expressly made to appear that the complainant, as holder and owner of the note secured by the trust deed, is one and the same person as the trustee named in the trust deed which is sought to be foreclosed, and is

45—Sedgwick v. Johnson, 107 Ill. 385.

46—Fountain v. Walther, 66 Ill. App. 529.

47—Dayton v. Dayton, 7 Ill. App.

136; Citizens Nat. Bank v. Dayton, 116 Ill. 257; Marsh v. Wells, 89 Ill.

App. 485.

48—McGooden v. Bartholic, 132 Ill.

App. 392.

known by the defendant to be such, it is not necessary that he should be joined in the proceeding as trustee also.⁴⁹

It was urged in the Supreme court that there was no evidence that the trustee had removed from the county, and the argument was, that in the absence of such proof the trustee was a necessary party to the proceedings, and it was error to proceed to a final decree in the case. This is but to question the capacity in which the complainant assumes to act. The objection was not made in any manner in the pleadings. It does not go to the merits of the bill but only tends to an abatement of the suit. If the defendant desired to raise the question as to the capacity of the complainant either as executor or trustee it is essential that the pleadings should be so framed as to put the question in issue. The failure to raise the objection by appropriate pleadings is an admission of the capacity assumed by the complainant.⁵⁰

Where a bill to foreclose a trust deed is filed by the owner of the note and the trustee, and a copy of the trustee deed is attached to the bill as an exhibit, the representative capacity of the trustee is sufficiently indicated without the use of the word "as" before the word "Trustee," where the trustee has no other relation to the suit.⁵¹

There is no merit in the contention that in the foreclosure of a trust deed in the nature of a mortgage that the suit should be commenced in the name of the trustee named in the trust deed. The suit may be commenced in the name of the holder of the notes secured thereby.⁵²

The legal holder of the notes secured by a trust deed is a proper party complainant in a bill to foreclose the trust deed, and the trustee may be made a defendant. The mere fact that the trust deed provided that in case of default in the payment of the note it may be lawful for the grantee,

49—*Dearlove v. Hatterman*, 102 Ill. App. 331.

50—*Fischer v. Stiefel*, 179 Ill. 59.

51—*Kinsella v. Cohn*, 185 Ill. 208.

52—*Surine v. Winterbotham*, 96 Ill. App. 123.

or his successor in trust, in his own name or otherwise, to file a bill to obtain a decree of sale does not deprive the holder of the note from doing so.⁵³

§ 2038. Parties Defendant—It may be stated generally that the only proper parties defendant to a foreclosure proceeding are the mortgagor and those who have acquired an interest in the premises through him subsequent to the mortgage.⁵⁴

§ 2039. Grantee of Mortgagor as Defendant—The grantee of a mortgagor who is not made a party defendant to a foreclosure is not affected at all by the decree entered therein. It is necessary that he should be brought before the court in order that his rights should be passed upon and settled by the decree.⁵⁵

His rights are neither changed, enlarged or diminished. By the conveyance to him he simply acquires the equity of redemption in the mortgaged land, or, in other words, he acquires merely the right to redeem from the mortgage and his right is wholly unaffected by a decree of foreclosure to which he is not a party. Indeed, the decree, as to him, is simply a nullity.⁵⁶

But the failure to make the grantee of the mortgagor a party defendant to a foreclosure suit, does not affect the validity of the decree in other respects, but simply leaves his right to redeem unimpaired. Where the original mortgagor is made a party defendant to a foreclosure suit, and there is no claim that the sale under the decree was unfair and irregular, the purchaser at the sale and his grantee should be protected. The object of the bill to foreclose is to sell the legal title which is in the mortgagee. The purchaser at the sale under the foreclosure takes the interest of the defendants, and also of the mortgagee, divested of any

53—Cheltenham Imp. Co. v. Whitehead, 128 Ill. 279; Dorn v. Colt, 180 Ill. 397.

54—Whittemore v. Schiel, 14 Ill. App. 414.

55—Piot v. Davis, 241 Ill. 434.

56—Seates v. King, 110 Ill. 456; Christie v. Burns, 83 Ill. App. 514.

equity of redemption on the part of all the persons who are parties. Although the grantee of the mortgagor, who is not made a party, is not affected, yet his interest, which remains the same, and which is only a right to redeem, does not confer or involve the right to bring ejectment.⁵⁷

§ 2040. Interest of Persons Disclosed by Pleadings—Where the answer discloses that there are persons interested in the premises who are not parties to the bill the complainant should amend his bill and make them parties; and where the evidence discloses to the court that persons so interested are not made parties, it should take notice of such omission, and the bill so amended as to make them parties. It is the duty of the complainant to see that he has before the court all necessary parties and when he takes a decree without making such persons parties defendant it will be reversed.⁵⁸

§ 2041. Wife of Mortgagor a Necessary Party Defendant—Where the wife of the mortgagor is not a party to a suit of foreclosure, it cannot be seriously urged that the husband so far represents her interest in the case that she is concluded by the decree entered therein. Any mistake or fraud committed therein cannot be binding on her.⁵⁹

In a proceeding to foreclose a mortgage upon the lands of a deceased mortgagor, where there can be no deficiency to be paid out of the personal estate, the administrator is not a necessary party to the foreclosure proceeding.⁶⁰

§ 2042. Parties Defendant, in any Capacity, Bound by the Decree—Parties cannot complain because they have not been brought into court in some other capacity than as individuals. When parties are properly brought into court they are, in legal intent, in court for all purposes whether as individuals or in a fiduciary capacity, and a decree will

57—Walker v. Warner, 179 Ill. 16.

60—Roberts v. Tunnell, 65 Ill. App.

58—Gale v. Carter, 154 Ill. App. 191.

478.

59—Lohmeyer v. Durbin, 206 Ill.

574.

bind and conclude them and the interest which they may happen to represent.⁶¹

§ 2043. Junior Mortgagee as Defendant—Unless the holder of a junior mortgage is made a party defendant to a bill to foreclose a senior mortgage, a decree entered therein will not bar the rights of the junior mortgagee in his rights or his equity of redemption.⁶²

§ 2044. Holders of Equity of Redemption a Necessary Party Defendant—It would seem to be well settled that a foreclosure proceeding to which the person holding the equity of redemption is not made a party is, as to such party, a nullity.⁶³

§ 2045. Judgment Creditors of Mortgagor as Defendants—Where a party files a bill to foreclose a mortgage and there are judgment creditors who have liens on the mortgage premises, the judgment creditors are necessary parties to the bill of foreclosure; but it has never been understood because they are made parties defendant to the bill they lose their right to redeem as judgment creditors. The right conferred by the statute on a judgment creditor is not cut off or abridged by reason of his being made a party defendant to a bill of foreclosure.⁶⁴

Where a bill is filed by a purchaser in a foreclosure proceeding against a judgment creditor of the mortgagor who had not been made a party defendant to the foreclosure proceeding for the purpose of determining his rights in the premises, and the judgment creditor answers, claiming the right to redeem under his judgment which at the time is a live judgment, the court acquires complete jurisdiction of the controversy, and in case the rendition of a final decree is delayed until after the time of redemption is expired, the court should in its decree provide for the revival of the

61—Harris v. Lester, 80 Ill. 307;
Breed v. Baird, 139 Ill. App. 15.

62—Cheney v. Patton, 134 Ill. 422.

63—Rodman v. Quick, 211 Ill. 546.

64—People v. Bowman, 181 Ill. 421.

judgment and a redemption to be made according to the rights of the parties at the time the bill was filed.⁶⁵

The rights of a judgment creditor are fixed by the state of facts existing at the date of his judgment and not by the facts existing at the date of the levy of his execution; and he will not, in equity, be allowed to take advantage of the release of a prior mortgage, after the recovery of his judgment, as against the rights of a purchaser from his debtor, who procures such release; such purchaser will be subrogated to the lien of the mortgage.⁶⁶

§ 2046. Executors and Administrators of Mortgagor as Defendants—The administrator of a deceased maker of a note and mortgage is a proper party defendant to a bill to foreclose the mortgage.⁶⁷

But in a proceeding against an administrator to foreclose a mortgage it is error to award costs against the administrator personally. They should be adjudged to be payable in the due course of administration.⁶⁸

§ 2047. Tenant in Possession as Defendant—All parties interested in the premises should be parties to a bill of foreclosure. So a tenant in possession paying rent is a necessary party. His interest in the premises is such that they will not be cut off unless he is made a party. Upon a sale of the mortgaged premises and a deed issued thereon the purchaser would be entitled to possession and a writ of assistance; but such a writ can only issue against the parties to the suit or parties claiming under them *pendente lite*.

A party desiring to bid at a foreclosure sale would likely be deterred from bidding if a party were in possession and not bound by the decree; and if such a party bid at all, it would likely be for a less sum than he otherwise would bid

65—Wehrheim v. Smith, 226 Ill. 346.

66—Smith v. Dinsmore, 119 Ill. 656.

67—Black v. Thompson, 120 Ill. App. 424.

68—Watts v. Hoffman, 77 Ill. App. 411.

and as the mortgagor is entitled to any surplus after the satisfaction of the decree, it is his right and for his interest to have the property sold for the best possible price.⁶⁹

§ 2048. Trustees and Beneficiaries as Defendants—A trustee in a trust deed as well as the cestui que trust, is a necessary party to the foreclosure of a trust deed; and as a general rule where a trustee is made a party to foreclosure proceeding the beneficiaries must also be made parties, unless they are so numerous that it would be impracticable to do so.⁷⁰

§ 2049. Unknown Owners as Defendants—It cannot be seriously disputed but that under the provisions of sections 7 and 12 of the Chancery Act R. S. that where “unknown owners” are made parties defendant, and they are non-residents, or whose addresses are unknown, two affidavits are imperatively required—the first affidavit for the purpose of procuring the issue of process, and the second affidavit to authorize the clerk of the court to cause notice by publication to such defendants to be made as directed by other statutory provisions. A substantial compliance with the provisions of the statute is essential to clothe the court with jurisdiction to proceed to adjudicate the rights of such persons and cannot be dispensed with.⁷¹

The unknown owners of notes secured by deeds of trust on real estate are necessary parties to a bill to foreclose a prior mortgage or trust deed if it is desired to affect their rights; and under the statute such parties may be made defendant under the designation of Unknown Owners.⁷²

§ 2050. Intervening Parties—Under numerous authorities the rule is established that parties having an interest in the subject matter of a suit in equity, and who are necessary or proper parties to such suit, if not made so by the

69—Gale v. Carter, 154 Ill. App. 478.

70—Rodman v. Quick, 211 Ill. 546.

71—Breed v. Baird, 139 Ill. App.

72—St. Louis Brewing Co. v. Gepart, 95 Ill. App. 187.

complainant, may come in by way of application to intervene, and may be made parties complainant or defendant, to the end that their interest may be adjudicated and protected.

The right to intervene has been defined to be: The admission, by leave of court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings.

There being no statute in Illinois authorizing the intervention of parties in equitable proceedings, therefore the right to intervene in such cases must depend upon the general rules in equity. In equity no one has a right to become a party to a suit unless he has some interest in the subject matter of the suit. But it is the usual practice to permit strangers to the litigation claiming an interest in the subject matter to intervene in their own behalf to assert such title.⁷³

§ 2051. Unnecessary Parties Defendant—A mortgagor who has sold and conveyed his interest in the mortgaged premises, and against whom no relief is asked, is not a necessary party to a foreclosure suit.⁷⁴

In a bill filed to foreclose in the nonpayment of several installments of interest, evidenced by coupon notes, the holder of the principal note and the subsequent interest notes need not be made parties to such foreclosure if no relief is sought against them.⁷⁵

The wife of the mortgagor is neither a necessary nor proper party to the foreclosure of a purchase money mortgage.⁷⁶

An administrator is not a necessary party to a bill of

73—Wightman v. Evanston Yaryan Co., 217 Ill. 371.

74—Borckway v. McClun, 243 Ill. 196; Thulin v. Anderson, 154 Ill. App. 41; Unity Co. v. Equitable Trust Co., 204 Ill. 595.

75—Boyer v. Chandler, 160 Ill. 394.

76—Lohmeyer v. Durbin, 206 Ill. 574; Short v. Raub, 81 Ill. 509; Harrow v. Grogan, 219 Ill. 288.

foreclosure which seeks nothing but a forfeiture, and does not seek to charge him personally nor the personal estate in his hands.⁷⁷

Where the presumption of law is that the mortgagor is alive at the time of filing the bill to foreclose his mortgage it is not necessary to make his presumptive heirs parties defendant thereto.⁷⁸

§ 2052. Improper Parties Defendant—Holder of Adverse Title—It is, as a general rule, not proper in a bill to foreclose a mortgage to make adverse claimants parties for the purpose of having the court pass upon their titles. Where the adverse claimant has no interest in the suit, his interest cannot be affected by it, and there being no privity between him and the mortgagee, the latter cannot make him a party defendant for the purpose of trying his adverse claim in the foreclosure suit. If, however, after the adverse claimant has acquired his title he purchases the equity of redemption from the mortgagor, then he would occupy a very different position from that of an adverse claimant, who is a stranger to the mortgage; for there would then exist a privity between him and the mortgagee in respect to the subject matter. Where the court allows a complainant in a foreclosure suit to give in evidence a deed from the mortgagor to the defendant, which contains full covenants of warranty against any and all incumbrances, the complainant may show that the deed did not represent the true transaction between the mortgagor and his grantee, and that it was in fact agreed as a part of the transaction that the grantee should assume and pay the incumbrance in question.⁷⁹

The owner of a tax title, unless he has acquired some interest in the equity of redemption, is not a proper party to a foreclosure suit for the purpose of testing the validity of his title. So where the owner of a tax title is made one

77—*Roberts v. Tunnell*, 165 Ill. 631.

79—*Carbine v. Sebastian*, 6 Ill.

78—*Reedy v. Camfield*, 159 Ill. 259.

App. 564.

of the defendants in a foreclosure suit, and it appears that his only claim is under the tax deed, he should be dismissed out of the case.⁸⁰

A stranger holding adversely to the mortgagor, as he is not affected by the mortgage, is in no way interested in the foreclosure suit. It makes no difference to him whether mortgage is valid or invalid, or whether it is discharged or foreclosed.⁸¹

Where one of the defendants to a bill of foreclosure shows that his claim to the premises is not in privity to the mortgagor, but adverse and paramount to the mortgage, the court should dismiss the bill as to him, and without prejudice to his rights, or to have preserved by the decree all matters of which he could avail himself, outside of the action in which he is engaged. And the fact that the person who holds an adverse title, not put in issue by the original bill, also holds a title derivative from the mortgage, does not change the rule.⁸²

§ 2053. Party Holding Unrecorded Deed—A party whose deed is not recorded but subject to a mortgage and is not in possession of the land cannot complain if he is not made a party defendant to a bill of foreclosure.⁸³

§ 2054. Effect of Failure to Make Proper Parties Defendant—It may be inquired what benefit the mortgagee derives from a foreclosure where a party beneficially interested in the property is not made a party to the foreclosure. The rights of the mortgagor and all parties made parties to the suit are foreclosed, and cases frequently arise where the premises are of greater value than all the incumbrances, and in such cases the foreclosure is of great benefit and gain to the mortgagee, as against whom, if he

80—Whittemore v. Schiel, 14 Ill. App. 414.

81—Perlin & Orindorff Co. v. Gal-
loway, 95 Ill. App. 60; Gage v. Perry,
93 Ill. 176; Ennis v. Wolff, 194 Ill.
420.

82—Perlin & Orindorff Co. v. Gallo-
way, 95 Ill. App. 60.

83—Oakford v. Robinson, 48 Ill.
App. 273.

becomes the purchaser, a subsequent mortgagee has only the right of redemption, and in failure of which the mortgagee purchasing at such sale becomes vested with an absolute title.⁸⁴

Where a party has an interest in the mortgaged premise but is not made a party to the foreclosure of the mortgage, his interest cannot in any degree be affected by a decree of foreclosure or other order entered in the suit.⁸⁵

Where the foreclosure proceedings are irregular on account of the want of proper parties, and the mortgagee purchases at the sale, it amounts to no more, so far as relates to the rights of the persons who are not made parties, than an entry upon condition broken; and if a stranger to the proceedings and mortgage becomes the purchaser, he will, as to those not made parties and having an equity of redemption, take an equitable assignment of the mortgage.⁸⁶

§ 2055. Rights of Mortgagee Subject to Mechanic's Liens—There seems to be an exception to the rule that a mortgagee cannot be affected by any act of the mortgagor or his grantee after the execution of the mortgage. The statute in regard to mechanic's liens provides that any person who shall contract with the owner of a lot or tract of land, or with one which such owner has authorized, or knowingly permitted to improve the same, and furnished materials, labor and other things, shall have a lien upon the lot and the improvements thereon for the amount of such labor and materials. So where the mortgagee knows of improvements being made upon the mortgaged premises, and sees them going on, his mortgage will be subordinate, at least to the amount of the value of the improvements, to that of the mechanic making the improvements, doing the work and furnishing the materials therefor, and the rights of the mechanic may be adjusted in a bill of foreclosure.⁸⁷

84—Rodman v. Quick, 211 Ill. 546.

86—Rodman v. Quick, 211 Ill. 546.

85—McIntire v. Yates, 104 Ill.

87—McCarthy v. Miller, 122 Ill.

491; Christie v. Burns, 83 Ill. App. 514.

App. 299.

§ 2056. General Allegations in Regard to Interest of Defendants, Not Parties to the Mortgage, Sufficient—Where a bill for the foreclosure of a mortgage joins as defendants several persons who are not parties to the instrument, under the general allegation that they have or claim to have some interest in or lien upon the premises in controversy which are inferior to the lien of the mortgagee, it is unnecessary to set forth the nature or character of such interest or lien so claimed, the general allegation being sufficient. Such an allegation puts the defendant under the necessity of setting up by way of answer and establishing it by evidence. This rule is founded upon the theory that the complainant, while bound to know the circumstances of his own title, is not supposed or required to know the particulars of the title of the defendants.⁸⁸

§ 2057. Demurrer to Bill for Want of Proper Parties—A demurrer to a bill of foreclosure for the want of proper parties it must be shown who are the proper parties from the facts stated in the bill, but not, indeed, by name, as that might be impossible; but in such a manner as to point out to the complainant the objection to his bill and thereby enable him to amend and make the proper parties. A demurrer to a bill for want of proper parties must show on its face that the cause of demurrer is the want of proper parties. And where this is not done that ground of objection cannot be taken advantage of as a defense.⁸⁹

The correct practice in overruling a demurrer to a bill is not to enter a decree, but to make an order requiring the defendant to answer, and if he does not do so within the time limited, to take the bill as confessed as to him. It has been held, however, that the question whether a defendant should be ruled to answer was a matter of discretion, and would not be reviewed. After overruling a demurrer, the court, without any further steps being taken against the

⁸⁸—Kehm v. Mott, 187 Ill. 519.

⁸⁹—Marsh v. Wells, 89 Ill. App.

defendant, unless he has asked and obtained leave to answer, has the undoubted right to decree relief against the defendant on the demurrer, which admits the truth of all allegations of the bill which are well pleaded, and the court may render a final decree in the case.⁹⁰

§ 2058. Motion to Dismiss a Bill of Foreclosure Amounts to a Demurrer—A motion to dismiss a bill of foreclosure upon the tender of the amount that the defendant says is due, and its payment into court, amounts to a demurrer to the bill, and admits all facts which are well pleaded in the bill, and it is also an admission by the defendant that there is due on the note and mortgage the amount tendered.

Where the bill shows rights which are the subject of equitable cognizance, and these are admitted to be true, the complainant is entitled to a decree.⁹¹

§ 2059. Defense to be Made by Way of Plea or Answer—It is a familiar rule in chancery pleading and practice that a defendant must set up his defense by plea or answer and cannot avail himself of any defense not so set up, even if proved by the evidence.⁹²

In pleas in a suit in equity, the same strictness is required as is required in pleas in a suit at law, at least in matters of substance. A plea in a suit in chancery should aver all facts necessary to make it a complete equitable defense to the suit, at least so far as the plea extends.

Where the allegations of the plea, taken as true, do not, so far as it purports to go, make out a full and complete defense to the bill, the plea will be defective and will not be sustained.⁹³

§ 2060. Payment of Notes to Agent of Mortgagee as a Defense—Where the defense of the mortgagor to a foreclosure proceeding is that he paid the notes to the agent of the mortgagee, the burden of proof is upon the mortgagor to

90—*Jocelyn v. White*, 201 Ill. 16.

92—*Kehm v. Mott*, 187 Ill. 519.

91—*Brand v. Kleinecke*, 77 Ill. App. 269.

93—*Cheney v. Patton*, 134 Ill. 422.

show that the party to whom the money was paid was the agent of the mortgagee and had authority to receive the money.

It is practically the universal custom to take up and cancel the notes when they are paid, and for one who is authorized to collect to have possession of the notes and be able to surrender them, and where the assumed agent does not have the notes it has universally been considered that there is no apparent authority to make the collection.⁹⁴

§ 2061. Replication May be Waived—It is well settled law that where a defendant joins in the taking of evidence, and a hearing is had upon the pleadings and proofs without objection, the defendant thereby waives the filing of any replication whatever. And this rule applies to foreclosure proceedings.⁹⁵

§ 2062. Proof of Execution of Note Unnecessary Without a Sworn Answer—It is not requisite that proof of the execution of the notes should be made, in the absence of a sworn answer denying their execution.⁹⁶

§ 2063. Affirmative Relief Granted Defendant Only on Cross-Bill—A junior incumbrancer cannot have affirmative relief beyond participating in the proceeds of the property in the distribution thereof, without a cross-bill asking therefor. The general rule is, that a party cannot have affirmative relief without pleadings asking for it.⁹⁷

§ 2064. Cross-Bill Must be Germane to Original Bill—It has always been held that the matters and things set up in a cross-bill must be germane to the original bill and relevant thereto. The new facts which it is proper for a defendant to introduce into a litigation by means of a cross-bill are such, and such only, as it is necessary for the court to have before it, in deciding the question raised in the

94—*Fortune v. Stockton*, 182 Ill. 454.

96—*Dean v. Ford*, 180 Ill. 309.

95—*Unity Co. v. Equitable Trust Co.*, 204 Ill. 595.

97—*Powell v. Starr*, 100 Ill. App. 105.

original suit to enable it to do full and complete justice to all the parties before it, in respect to the cause of action upon which the complainant rests his right to aid and relief. If the defendant, in filing a cross-bill, goes beyond this, and introduces new and distinct matter, not essential to the proper determination of the matter put in litigation by the original bill, although he may show a perfect case against the complainant, or one or more of his co-defendants, his pleading will not be a cross-bill but an original bill, and no decree can be rendered on such matter.**

§ 2065. Cross-Bill Unnecessary to Protect Rights of Subsequent Incumbrancers—In a bill of foreclosure no cross-bill is necessary to protect the rights of subsequent incumbrancers, as that can be done by the answer.**

The original bill being filed by the senior incumbrancer, and the junior incumbrancer being made a party defendant, the right of the latter to participate in the distribution of the surplus after the satisfaction of the senior incumbrancer is unquestioned, where the latter files an answer setting up his claim. A cross-bill is unnecessary unless affirmative relief other than a foreclosure were prayed. And so, also, it is unnecessary to decree the foreclosure of both mortgages, or specifically subject the premises to sale for the payment of the amount found due upon both mortgages. And where the second mortgage specifically pledges the rents and profits of the premises to the second mortgagee, after the first mortgage is satisfied by the sale, it would seem to be no more than right and proper that the rents and profits during the period of redemption should be paid to him, and the only way this can be done is by way of a receiver. And in such case where the second mortgagee applies for the appointment of a receiver by way of a petition for the appointment thereof, this would seem to be an insistence upon his rights, and if, under any authority, a

98—Parlin & Orindorff Co. v. Gallo-
way, 95 Ill. App. 60.

99—Gardner v. Cohn, 191 Ill. 553.

cross-bill was a proper mode of urging relief by way of a receiver, it is not perceived why a petition does not answer all the purposes of a cross-bill for that object.¹

§ 2066. Foreclosures Open to Equitable Defenses—A mortgage or trust deed in the nature of a mortgage is not assignable either at common law or under the statute, and while the assignment of a promissory note secured by a mortgage carries with it the mortgage as an incident to the debt, it does so only in equity. Where resort is had to a court of equity to enforce the obligation created by the mortgage, it will let in any defense which would have been good against the mortgage in the hands of the mortgagee himself, except only defenses based upon latent equities of third persons of whose rights the assignee had no notice.

A mortgage gives notice on its face that the mortgagor is the debtor, and if the assignee fails to obtain actual notice of any equities or defenses of such debtor it is due to his own negligence. The assignee is not bound to inquire of third persons whether they have any equities, and he is presumed to take the mortgage without notice of any such equities and free from them.

There is an exception to the doctrine that one seeking to foreclose a mortgage in equity is subject to any defense which would have been good against the mortgage in the hands of the mortgagee. That is, in the case of corporation bonds. Bonds of that kind are issued for the purpose of raising funds for the corporation, and are intended to be thrown upon the market, and to pass from hand to hand. The mortgage or trust deed secures the holders of the bonds, and can be enforced by the holders of such bonds for their full face value regardless of equities. To permit equitable interferences to be interposed would practically destroy such methods of raising funds, and the corporation is properly estopped from denying its liability.²

1—Cohn v. Franks, 96 Ill. App. 206.

2—Peacock v. Phillips, 247 Ill. 467.

When a creditor, in advance of an offer to pay, or in response to such an offer, informs the party under obligation to pay, that he will not accept the amount actually due, in discharge of the indebtedness, the party under obligation to pay is relieved of the duty of tendering the amount actually due.³

§ 2067. Correcting Mistakes in Mortgages in Equity—In case of mistake in written instruments, as against bona fide purchasers, for a valuable consideration, without notice, courts of equity will grant no relief. So in a bill seeking to foreclose a mortgage in which a mistake occurs in the description of the land which is sought to be corrected against a purchaser for a valuable consideration, which fails to state that the subsequent purchaser acquired title with notice of the mistake, a decree foreclosing the mortgage as prayed in the bill is erroneous.⁴

But the rule above stated does not apply where the subsequent purchaser had notice of the mistake, or if the record discloses facts from which the purchaser might have had notice had he not wilfully or negligently shut his eyes against those lights which with proper observation would have led him to knowledge, he will be charged with notice.⁵

§ 2068. Latent Equities of Third Parties—The rule that the equitable assignee of trust deed or mortgage holds it subject to all equitable defenses which the mortgagor may have against it, is not extended to and subject to the latent equities of a third party, such as the assignee of the notes, of which no notice is given.⁶

Where a trustee in a trust deed, having possession of, but no title to, the note secured by the trust deed, fraudulently transfers the same as collateral security for his own debt, the burden of proof is upon the assignee to show that he took the paper in good faith, without notice of any de-

3—Gorham v. Farson, 119 Ill. 425.

4—Siekmon v. Wood, 69 Ill. 329.

5—Morrison v. Miles, 270 Ill. 41.

6—Kittler v. Studebaker, 113 Ill. App. 342.

fects, for a valuable consideration, before maturity and in the usual course of business.⁷

§ 2069. Rights of Personal Sureties on Mortgage Notes

—The rule of law that the payee is required to hold the mortgage security intact for the payment of the note on which there is personal security, under a penalty, in case of failure to do so, of losing the benefit of the personal security, only applies to cases where there are no counter equities in favor of the payee of the note or other persons, superior to those of such personal securities. So, if the personal securities are not injured by the actions of the holder of the securities they have no reason to complain.⁸

§ 2070. Mortgages Exempt from Defenses to the Same Extent as Negotiable Paper Described Therein if Held by Bona Fide Purchaser for Value Before Maturity—Statute

—“That whenever a mortgage, trust deed or other conveyance in the nature of a mortgage is executed, conveying real estate for the purpose of securing an indebtedness on the real estate mentioned in said mortgage, trust deed or other conveyance, such mortgage, trust deed or other conveyance shall be considered as incident to the indebtedness secured thereby and shall be exempt from defenses to the same extent as negotiable paper described in said mortgage, trust deed or other conveyance if held by a bona fide purchaser for value before the maturity of the indebtedness mentioned in and secured by said mortgage, trust deed or other conveyance.”⁹

It is commonly reported that the Act of May 10, 1901, was never passed by the House of Representatives, and its validity may be contested on that account. It would seem that the object of its enactment was to overcome the rule of law stated in the case of *Olds v. Cummings*, 31 Ill. 188,

7—*Chicago T. & T. Co. v. Brugger*,
196 Ill. 96.

9—*Laws of 1901*, p. 248.

8—*Jackson v. May*, 28 Ill. App.
305.

and other like cases. Whether it has accomplished this object is a very serious question.

§ 2071. Usury as a Defense—The statutes in regard to usury are as follows: “No person or corporation shall directly or indirectly accept or receive, in money, goods, discount, or thing in action, or in any other way, any greater sum or greater value, for the loan, forbearance or discount of any money, goods or thing in action, than as above provided.”¹⁰

§ 2072. Penalty for Violation of Statute—“If any person or corporation in this state shall contract or receive a greater rate of interest or discount than seven (7) per cent upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled to recover only the principal sum due to such person or corporation. And all contracts executed after this Act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified, on account of non-payment at maturity, shall be deemed usurious, and only the principal due thereon shall be recoverable.”¹¹

A mortgagor seeking to redeem cannot be relieved from all interest because usury has been agreed upon or reserved. He should be required to pay some rate of interest, whether the agreement is established or not.¹²

§ 2073. Usury to be Pleaded—Statute—“The defense shall not be allowed in any suit, unless the person relying on such defense shall set up the same by plea, or file in the cause a notice in writing, stating that he intends to defend against the contract sued upon or set off, on the ground that the contract is usurious.”¹³

§ 2074. Pleading Usury a Personal Privilege—The privilege of pleading usury is personal to the mortgagor, and

10—Sec. 5, Ch. 74, R. S.

13—Sec. 7, Ch. 74, R. S.

11—Sec. 6, Ch. 74, R. S.

12—Sutphen v. Cushman, 35 Ill.

those who are in privity with him; if there be no agreement or understanding about it, his grantee will have the right to make the defense; an implied authority from the mortgagor is all that is necessary and where it is not agreed or understood that the grantee of the mortgagor or some subsequent mortgagee shall pay the incumbrance with the usury, the authority to make the defense is implied.¹⁴

§ 2075. Devises to Evade the Penalties for Usury—No form which can be given to a contract, no devise by which a new form is given to an old transaction tainted with usury, and no mere substitution of securities, will avail to cut off the defense of usury. The giving of a new note by one of several joint debtors does not deprive the maker of the new note to deduct such usury contained in the old note.¹⁵

The fact that the party lending the money is put to trouble and expense in making the loan cannot be regarded as freeing the transaction from the taint of usury. If such a case is not tainted with usury it would be easy to evade the statute in regard to usury.¹⁶

§ 2076. Defense of Usury Not Allowable Where Transaction is Wholly Completed—After a usurious transaction has been completely settled and closed, and a new loan is made, the borrower will not be allowed to set up the usury in the former transaction against the new loan. Usury in one transaction cannot be availed of in another. But a settlement and agreement upon an amount due, and the giving of a new note do not preclude the defense of usury existing in the original transaction. So long as any part of the original debt remains unpaid the defendant may insist upon deducting the usury, and only the balance remaining, after the application on the principal of all payments, whether on principal or interest, can be recovered.¹⁷

14—Crawford v. Nimmons, 180 Ill. 143; Ray v. Loddell, 213 Ill. 389; Siegel v. Borland, 191 Ill. 107.
15—Cobe v. Guyer, 237 Ill. 568.

16—Jackson v. May, 28 Ill. App. 305.
17—Cobe v. Guyer, 237 Ill. 568.

§ 2077. Heir Estopped to Plead Usury if Ancestor was Estopped—An heir, so far as he succeeds to the title of the deceased owner, obtains no greater interest in the premises than had his deceased ancestor, and if the deceased was estopped from questioning the validity of the mortgage, the heir is likewise estopped from so doing.¹⁸

§ 2078. Affirmance by Mortgagor of Amount and Validity of Mortgage—In considering the question as to what shall be considered as an affirmance by the mortgagor as to the amount and validity of the mortgage debt, it is, perhaps, not easy to reconcile all the expressions used in the different opinions. It has sometimes been said, in substance, that if the mortgagor sells the land subject, in express terms, to a previous mortgage, the purchaser cannot question its validity; but when these cases are examined it will be found that additional facts have been required to prevent the grantee from making the defense. In all cases where it has been held that a grantee cannot question the mortgage he has purchased the property on the basis of a clear title, at an agreed price, and assumed to pay the mortgage debt as a part of the consideration, or the amount of such debt has been deducted from the purchase price of the land on the basis of such clear and perfect title. In such cases the grantee has paid to the grantor that part of the purchase price representing the estimated value of the equity of redemption and has reserved the amount of the incumbrance, which he has agreed to apply in satisfaction of it, or which he has held to protect himself from the incumbrance by exercising his option to pay it and save the property, or let it go under the incumbrance.

The incumbrance forming a part of the consideration for the purchase of the property, it would be permitting a fraud to allow the grantee to plead usury. If the mortgagor chooses to affirm his contract and set apart, out of the purchase price for the complete title, an amount sufficient to

18—*Lang v. Dietz*, 191 Ill. 161.

pay it, whether from an express agreement from the grantee to make such payment or with an option either to pay or suffer a foreclosure, the grantee cannot question the amount. If the usury has become a part of the consideration in the agreement between the mortgagor and his grantee, it is an affirmation of the debt by the mortgagor, and when the grantee contracts with a view to the payment of the incumbrance, equity demands that he should pay it or lose the property.

But the mere fact that a deed is made subject to a mortgage does not prevent the grantee from raising the question of usury in the mortgage as a defense in a foreclosure.¹⁹

§ 2079. Illegality or Failure of Consideration—Where the consideration for a note secured by a mortgage or an unidentified part thereof, arises out of an illegal agreement to combine to advance and control the price of manufactured commodities, the courts will deny a foreclosure of such a mortgage. Under such circumstances the courts will leave the parties in the condition in which they have placed themselves.²⁰

Where a party executes notes and a mortgage to secure the same, and delivers them to an agent to be disposed of for the purpose of raising money to be used in a particular enterprise, and the agent does dispose of the securities, but uses the money derived therefrom for a purpose not contemplated by the maker, on a bill to foreclose the mortgage filed by the purchaser of the securities, it cannot be urged that there was no consideration for the notes; as the agent acted within his authority in disposing of the notes, the principal is bound by the acts of his agent; the purchaser of the notes and mortgage is in no manner responsible for the acts of the agent in the use he makes of the money derived from the sale of the security.²¹

19—Crawford v. Nimmons, 180 Ill. 143; Ray v. Lobdell, 213 Ill. 389; Siegel v. Borland, 191 Ill. 107.

20—Evans v. American Strawboard Co., 114 Ill. App. 450.

21—McIntyre v. Yates, 104 Ill. 491.

§ 2080. Statute of Limitations as a Defense to Foreclosure of Mortgage—Statute—This would seem to be a proper place to introduce the Statute of Limitations as a defense to a foreclosure of a mortgage. The statute is as follows: "No person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrues." ²²

This section must be read in connection with section 16 of the same chapter which is as follows: "Actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidence of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued; but if any payment or new promise to pay shall have been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment or promise to pay." ²³

It must also be read in connection with section 18 of the same chapter, which is as follows: "If, when a cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited, after his coming into or returning to the state; and if, after the cause of action accrues he departs from and resides out of the state, the time of his absence is no part of the time limited for the commencement of the action. But the foregoing provisions of this section shall not apply to any case when, at the time the cause of action accrued or shall accrue, neither the party against nor in favor of whom the same accrued or shall accrue, were or are residents of this state." ²⁴

§ 2081. Matters Barred at Law Barred in Equity—If there be a legal and an equitable remedy provided in re-

22—Sec. 11, Ch. 83, R. S.

24—Sec. 18, Ch. 83, R. S.

23—Sec. 16, Ch. 83, R. S.

spect to the same subject matter or as to matters joined together, the equitable remedy is under the control of the same statutory bar as the legal remedy. So, if an action at law on a promissory note is barred by the statute, a bill to foreclose a mortgage given to secure the note will also be barred.²⁵

The Statute of Limitations will not run against a mortgage securing the payment of a note until the lapse of ten years after the note becomes due. In like manner, where the time of payment is extended, the statute will not run against the mortgage until it runs against the note. While there may be decisions in other states which take a different view of statutes somewhat similar to our own, still the court is satisfied with the construction to our statute and the court is not inclined to depart from such construction. The extension of the time of payment of the note extended the time within which the deed of trust or mortgage could be foreclosed.²⁶

§ 2082. Payment on Obligation Tolls Statute of Limitations—The payment of interest on a promissory note stops the running of the Statute of Limitations. And a suit to foreclose a mortgage may be begun at any time within ten years after the last payment of interest on the note secured by the mortgage.²⁷

Payments made on an overdue note secured by a mortgage, by the grantee of the mortgagor owning a life estate and the reversionary interest in the premises, operate to arrest the running of the Statute of Limitations, both as to the life estate and the reversionary estate, even though the latter is subject to be divested upon the happening of a contingency, provided at the time the payments are made the contingency has not happened.²⁸

25—Harding v. Durand, 138 Ill. 515.

26—Kraft v. Holzmann, 206 Ill. 548; Murray v. Emery, 187 Ill. 408.

27—Stein v. Kaun, 244 Ill. 32.

28—Pinkney v. Weaver, 216 Ill. 185.

§ 2083. Affirmative Intention to Make Payment on Particular Debt, Essential—In order to make a payment by a debtor to a creditor effectual as a payment on a particular debt, there must be an actual affirmative intention on the part of the debtor to make a payment on the particular debt, before the court can infer a promise on the part of the debtor to pay the particular debt. It is a general rule, no doubt, that where a debtor makes a payment without designating to which of several claims it shall apply, the creditor may apply it to which one he pleases; but this will not authorize the creditor to so apply it as to bind the debtor by an implied new promise, without the actual intention of the debtor to make such a promise. This is a matter in which the debtor must have an affirmative intention before he can be bound. His volition is indispensable in order to bind him. If he has no intention one way or the other, even then he could not be held to have made a new promise, for to do that he must have an affirmative intention.²⁹

§ 2084. Admission that Debt is Still Due and Unpaid Essential—In order to take a case out of the statute of Limitations there must be a promise to pay the debt, and such promise may be implied from an unqualified admission that the debt is due and unpaid, nothing being said or done at the time rebutting the presumption of a promise to pay. It is not sufficient that the debtor admits the account to be correct, or that he had received the goods or the money, or had executed the note sued upon, but he must go further, and admit that the debt is still due and has never been paid. The bare admission of the correctness of the account or genuineness of the note sued upon is no more a satisfactory answer to the statute than would be the testimony of a witness proving the same facts.³⁰

§ 2085. Effect of Payment by Joint Maker of Note—While a partial payment by one joint debtor without the

29—Kallenbach v. Dickinson, 100 Ill. 427.

30—Kallenbach v. Dickinson, 100 Ill. 427.

knowledge or consent of the other or his subsequent ratification thereof will not bind the other joint debtor so as to authorize the inference of a new promise on his part and will toll the Statute of Limitations, a mortgage given to secure a joint and several note will operate to continue a lien on the mortgaged premises so long as payment of the note may be enforced against either joint debtor and until the debt is extinguished. It may be true that if the Statute of Limitations has run against the principal maker of the note, no personal judgment against him could be rendered, but this would not bar the right of the holder of the note to proceed in rem to foreclose his mortgage against the property involved. And where the principal maker of the note is the owner of the property mortgaged, makes payments on a joint and several note, so as not to toll the Statutes of Limitation as to him, a foreclosure of the mortgage may be enforced against his heirs.³¹

While it is very plain that the payment by one maker of a joint note is a payment for all so far as relates to the satisfaction of the debt, that fact neither shows, nor has it a tendency to show, a new promise or acknowledgment by the other joint debtors. Payment is nothing more than an admission that the debt is due, and like any other admission it can only affect the party who makes it, unless he is authorized to speak for the others as well as for himself. A joint debtor has no such authority. It can not be justly inferred from the relation he sustains to the other joint debtors, and although he may conclude himself by an admission he cannot conclude them. So it is held that in case of joint debtors a partial payment by one, without the knowledge or assent or subsequent ratification of the others, will not operate to bind the others so as to authorize the inference of a new promise on their part, and therefore will not affect the defense of the Statute of Limitations as to them.³²

31—Ritzmuller v. Neuer, 130 Ill. App. 380.

32—Kallenbach v. Dickinson, 100 Ill. 427.

It is recognized law that one maker of a promissory note cannot, by making payments thereon or by any other act, stop the running of the Statute of Limitations against another joint maker, unless it appeared that the party making the payment was the agent of such other joint maker for the purpose of making the payment. But where the joint maker of a note, or the representative of a deceased joint maker, has unquestioned authority from his co-maker or decedent to make payment on an indebtedness, his acts therein will bind those whom he represents to the extent of creating a new promise and binding on the indebtedness, otherwise barred by the Statute of Limitations.³³

§ 2086. Proof that Payments Were in Fact Made Essential—The endorsement of the payments of interest on a note made by the holder thereof will not of themselves be evidence of a new promise. It will devolve upon the holder of the note to show that such payments were in fact made by the payor or by some one authorized by him.³⁴

Where by the state of the pleadings the plaintiff admits that the action is barred unless saved by reason of the payment on the note made by the maker, the burden of producing a preponderance of the evidence as to the alleged payment is upon the plaintiff and not upon the defendant.³⁵

§ 2087. Written Promise to Pay Indebtedness, When Applicable—In order to remove the bar of the statute of limitations in regard to a debt, there must be a new promise to pay the debt. And this new promise must be either implied or expressed. By section 16 of the Limitation Act it is provided that if the evidence of the debt be an instrument in writing, then any payment thereon, or any promise in writing to pay the same, shall have the effect of extending the time in which an action can be brought on the indebted-

33—*Waughop v. Bartlett*, 165 Ill. 124.

34—*Waughop v. Bartlett*, 165 Ill. 124.

35—*Simmons v. Nelson*, 48 Ill. App. 520.

ness thereafter to the full period mentioned in the statute. The language of the statute in this regard is: "But if any payment or new promise to pay shall be made, in writing." It was contended that the expression "in writing" qualified the "payment" as well as the "promise." But it was held that the term "in writing" did not apply to the payment so far as to require the evidence of it to be preserved, and that the words "in writing" have reference alone to the specified "new promise to pay." So it was held to be reversible error for the trial court to sustain a demurrer to a replication averring payment on the note sufficient to revive it where the allegation in the replication in regard to the payment the further allegation that the evidence of such payment was preserved in writing was omitted. This question is considered fully and at large in the case cited.³⁶

Where the relation of the party making the payment is of a dual character to the note, such as surety for the principal debtor, and as executor and trustee under the will of the maker, and as such it is his duty to pay the interest accruing on the note, his payment of such interest will be referred to his duties as such trustee, and will prevent the running of the Statute of Limitations, as provided therein.³⁷

Where the complainant in a foreclosure proceeding fails to prove that the owner of the mortgaged land was a party to the payment on the note, so as to stop the running of the Statute of Limitations, or consented thereto or had knowledge thereof, the endorsement of such payment on the note is insufficient to show that the debt had been kept alive with his knowledge and consent and he is discharged from the debt.

In the case of *Holroyd v. Millard*, 142 Ill. App. 392, there is quite an extended review of the authorities in regard to what payments on the note will keep the indebtedness alive and what will not. It would be well for the reader

36—*Bowles v. Keator*, 47 Ill. App. 98.

37—*Waughop v. Bartlett*, 165 Ill. 124.

to study this case. The opinion is by Mr. Justice Dibell, a very careful and painstaking jurist.³⁸

§ 2088. Maker of Obligation Absent from the State—In a foreclosure by the mortgagee against the grantees of the mortgagor, although the mortgagor is not made a party to the suit, the time the mortgagor is absent from the state after the right of action has accrued on the mortgage debt cannot be reckoned as part of the time limited for the commencement of the foreclosure suit against his grantees. So long as the mortgage indebtedness exists as a binding obligation against the mortgagor, the mortgage may be foreclosed against his grantees.³⁹

§ 2089. Statute of Frauds or Limitation to be Pledged as a Defense—It is a familiar principle in equity, that a defendant cannot avail himself of the benefits of the Statute of Frauds or of Limitations, unless he specially relies thereon by answer, plea or demurrer. If he fails thus to claim the protection of the statutes, he is understood as waiving them. He must give the complainant an opportunity by averments and proof that the case is not within the statutes. If this is done the complainant may amend his bill, by asserting allegations accounting for the delay or explaining the supposed fraud, and thereby lay the foundation for the introduction of proof to sustain the case against the objection.⁴⁰

§ 2090. Persons Who May Interpose Statute of Limitations as a Defense to Foreclosure—While the relation of mortgagor and mortgagee exists, neither party in possession can take advantage of the Statute of Limitations, under the provisions of the statute in regard to possession under claim and color of title and the payment of taxes for seven successive years as a defense against the other. The statute can only commence to run after that relation has

38—Holroyd v. Millard, 142 Ill. App. 392.

39—Richey v. Sinclair, 167 Ill. 184.

40—School Trustees v. Wright, 12 Ill. 432.

terminated, if it once existed in some way known to the law.⁴¹

During the continuance of that relation, neither party in possession of the property can interpose the statute as a defense against the other.⁴²

One who purchases land covered by a mortgage acquires such a privity or relation to the mortgagor as to enable him to plead the Statute of Limitations against the mortgagee, as far as recourse to the land itself is concerned. And it makes no difference whether the mortgagor pleads or omits to plead it.⁴³

By section 19 of the Limitation Act where a cause of action survives and is not barred by the death of the debtor, the creditor is allowed one year after the letters of administration are issued in which to bring his suit. So where a bill of foreclosure was filed within one year after the issuing of letters of administration it was held the Statute of Limitation could not be pleaded as a defense.⁴⁴

Although the grantee may have been in possession of the property under claim and color of title, acquired in good faith and paid all taxes thereon for seven successive years, still he is not protected in his title as against the foreclosure of a mortgage which was duly recorded prior to his conveyance, so long as the Statute of Limitations has not run against the mortgage. The grantee of the mortgagor only succeeds to the rights of the mortgagor in the estate and takes the land subject to the mortgage. So, if a mortgage may be enforced against the mortgagor, it may also be enforced against his grantee.⁴⁵

But where there is an attempt, unconnected with fraud, to foreclose a mortgage, and a decree is rendered and a sale had, although the decree may be erroneous, or even void, still it shows an unmistakable intention to change the rela-

41—Norris v. Ile, 152 Ill. 190.

44—Roberts v. Tunnell, 165 Ill. 631.

42—Rockwell v. Servant, 63 Ill. 424.

45—Medley v. Elliott, 62 Ill. 532;

43—Blakeslee v. Hoit, 116 Ill.

Brown v. Devine, 61 Ill. 260.

App. 83.

tions of the parties from mortgagee and mortgagor to that of a claim of separate and independent rights; that a deed under a foreclosure and sale constitutes color of title, and the relation of the parties, from that time forward, are hostile, that their fiduciary relation has been terminated, and they henceforth act as strangers in reference to the mortgaged property, and that a deed executed in the foreclosure proceedings of a senior mortgage, and the possession of the premises, and the payment of the taxes for seven successive years constitutes a bar to the foreclosure proceedings of a junior mortgage, although the holder thereof was not made a party to the foreclosure of the senior mortgage.⁴⁶

§ 2091. Set-offs and Counterclaims Allowed in Equity—

While it is undoubtedly true that equity had original jurisdiction in matters of equitable set-off before the enactment of the statute authorizing set-off at law, still, as a general rule, equity follows the law, and will not allow a set-off where it would not be allowed at law unless there be shown some special equity, such as the insolvency of the party owning the cross-demand, or some other ground for the exercise of equitable jurisdiction. The mere existence of a cross-demand is not sufficient. Where, however, there has been a mutual credit given by each upon the footing of the debt by the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or set-off to the other, a set-off will be allowed in equity. In the case of insolvency the cross-demand would probably be lost, if the set-off were not allowed against the demands of the insolvent.⁴⁷

A mortgagor is entitled to a reduction of the amount of his note to the extent he can establish counter claims, and this is true whether it be regarded as a set-off or a payment pro tanto of the debt. Equity has original jurisdiction in matters of equitable set-off, independent of the stat-

46—*Mason v. Ayers*, 73 Ill. 121.

47—*Smith v. Billings*, 170 Ill. 543.

ute authorizing set-offs in actions at law. The fact that the suit is brought by an administrator does not change the rule. The rights of the other creditors are not prejudiced by the application of this rule, since the portion of the debt which was paid or extinguished in the lifetime of the deceased cannot, in any just sense, be regarded as an asset of the estate.⁴⁸

§ 2092. Parties Becoming Interested in Property Pendente Lite—Where a party becomes interested in the subject matter of the litigation *pendente lite*, it is not necessary that the proceedings should be stayed until he can be made a party by name and served with summons to come into court. So a party purchasing an equity of redemption after a foreclosure of a mortgage and a sale thereunder is not entitled to notice of proceedings taken therein. This doctrine has been so frequently declared that the citation of authorities is a work of supererogation.⁴⁹

§ 2093. Lis Pendens Defined—A pending suit. The doctrine of *lis pendens* is peculiarly applicable to foreclosure proceedings. It is the doctrine which holds that the subject matter of a suit is under the control and subject to the order of the court in which the suit is pending, so as finally to be subject to its decree and bound thereby; and the decision of the court will be binding not only upon the actual parties to the suit but also upon all those who become interested in the premises under the parties by conveyance or otherwise, pending the period of litigation. If these were not the rule the parties might, by transferring their interest during the pendency of the suit, defeat its whole purpose and make the litigation endless.⁵⁰

§ 2094. Commencement of Lis Pendens—*Lis pendens* commences, in chancery cases, with the service of the summons or subpoena upon the defendant, after the filing of the bill.⁵¹

48—Printy v. Cahill, 235 Ill. 534.

49—Equitable Trust Co. v. Wilson,
200 Ill. 23.

50—Norris v. Ile, 152 Ill. 190;

Christie v. Burns, 83 Ill. App. 514.

51—Norris v. Ile, 152 Ill. 190.

§ 2095. **Essentials to Lis Pendens**—Three facts are necessary to the existence of a valid *lis pendens*; first, the property involved must be of such a character as to be subject to the rule; second, the court must have jurisdiction of the parties and the *res*, or property involved; third, the *res*, or property involved, must be sufficiently described in the pleadings. And in regard to the description of the property, the legal maxim is that is certain which can be made certain, applies to the creation of *lis pendens*.⁵²

§ 2096. **Amendment to Bill as Affecting Lis Pendens**—Where a bill is so defective in the description of the property involved, or in the language of its prayer, as to create *lis pendens*, and the defect is subsequently corrected by amendment in these particulars, the *lis pendens* will commence at the time of filing the amendment, where the defendant has been served with process. But an amendment which amounts to the mere pleading of matters of evidence, and which does not change the essential character of the case made by the bill, will not prevent the *lis pendens* from relating back to the original bill or the last substantial amendment, and subject the interest acquired thereafter to the operation of the decree of foreclosure.⁵³

§ 2097. **Continuous Prosecution of the Suit as Affecting Lis Pendens**—It has been said that in order not to suspend a *lis pendens* there must be a full and continuous prosecution of the suit. But the rule in reference to a continuous prosecution simply requires that there shall be no such neglect in the prosecution as cannot be explained and appears to be inexcusable. Mere lapse of time does not indicate such neglect. If the case finally goes to a decree or judgment, it will be presumed, in the absence of any showing that there has been a negligent intermission of the prosecution, that there has been a binding *lis pendens*, and that the interveners *pendente lite* are bound by the decree or judgment. As a general rule there will be no estoppel

52—Norris v. Ile, 152 Ill. 190.

53—Norris v. Ile, 152 Ill. 190.

against the right to enforce a *lis pendens* unless the complainant in the suit has been so negligent in its prosecution as to induce the belief that the prosecution has been abandoned.⁵⁴

§ 2098. Priority of Liens Against the Mortgaged Property Determined—On the foreclosure of a mortgage the complainant has the right to have the priority of the liens against the property determined and a decree entered for their payment in their order of priority as a necessary incident to the rights of the mortgage, and without a cross-bill by the lien holders.⁵⁵

While a purchaser of a note before maturity, without notice of any defense thereto, will be protected against all defenses against the note, still, if it is secured by a mortgage or other securities, the assignment will not cut off prior equities against the mortgage or collateral fund, though such equities are secret and latent. So where the holder of several notes secured by a mortgage, maturing at different times, transfers the notes last maturing under an agreement with the assignee that he should hold a preferred lien upon the mortgaged premises for the security of the notes so assigned, as against the notes first maturing, which are retained by the mortgagee, a subsequent purchaser of the notes first maturing will be chargeable with notice of such agreement, and will hold the notes so purchased by him subject to the prior equity of the purchaser of the notes last maturing, to have his notes satisfied first out of the mortgaged premises. And this is especially the case where the subsequent purchaser of the notes first maturing obtains a mere equitable title to them. He would then be bound to know that they were subject to all equities existing as to the fund relied upon for their payment at the time of such purchase. A person dealing with equita-

54—*Norris v. He*, 152 Ill. 190.

55—*Dillman v. Will Co. Nat. Bank*,
138 Ill. 282.

ble claims to paper and equitable securities for its payment, should inquire of the maker, and in case there are several notes thus secured, only a portion of them is offered to be transferred, he should inquire of the payee whether the others have been sold with a preferred lien on the security.⁵⁶

There are a number of cases, however, which hold, as between two equitable mortgages, negligence is sufficient to postpone the one which is prior in time to the equity of the other. A court of equity will not prefer the one to the other on the mere ground of priority of time, until it finds, upon an examination of their relative merits, that there is no other sufficient ground of preference between them, or that their equities are in all other respects equal. It is only where the equities are equal that he whose equity is first obtains the better right.⁵⁷

§ 2099. Rights of Senior and Junior Mortgagees—Upon the foreclosure of a senior mortgage the estate or equity of redemption theretofore existing in the mortgagor is extinguished, and nothing will remain upon which a junior mortgage can attach, or which can be sold on its foreclosure. The remedy of the junior mortgagee is to redeem from such sale in pursuance with the statute in such case. By a foreclosure of a prior mortgage, and a sale and conveyance thereunder, the legal title of the mortgaged premises will be vested in the grantee in the master's deed, leaving nothing in the mortgagor or the junior mortgagee but the right to redeem in equity, where equitable grounds for redemption exist, and upon such redemption by the junior mortgagee he may foreclose his mortgage, and have the land sold in satisfaction of his debt, and the sum advanced to redeem from the prior sale.

The right of a junior mortgagee is not cut off by a foreclosure of a senior mortgage to which he was not a party.

56—Walker v. Dement, 42 Ill. 272;
Jackson v. Grosser, 218 Ill. 494.

57—Bohde v. Rohn, 232 Ill. 180.

But after such a foreclosure has proceeded to a deed, a junior mortgagee cannot maintain a bill to foreclose his mortgage without seeking to redeem from the former mortgage sale. A junior mortgage, however, may foreclose upon an equity of redemption, subject to the lien of the prior mortgage, where the latter has not been foreclosed, and a title made thereunder.⁵⁸

§ 2100. Subrogation a Principle of Equity—Subrogation is a principle of equity jurisprudence, and is generally confined to the relation of principal and surety and grantors, or to a case where a person is compelled to remove a superior title to that held by him in order to protect his own, and also to cases of insurers. The general principle of subrogation is confined and limited to these classes of cases. While these general heads include the doctrine and principles of subrogation, that doctrine has been steadily expanding and growing in importance and extent in its application to various subjects and classes of persons. This equitable principle is enforced solely for the accomplishment of substantial justice, where one has an equity to invoke which cannot injure an innocent person. The right to subrogation which springs from the mere fact of the payment of a debt, and which is included under the heads first above stated, is what is termed legal subrogation and exists only where included within these classes. But in addition to this principle of legal subrogation there exists another principle which is termed conventional subrogation, which results from an equitable right springing from an express agreement with the debtor, by which one advances money to pay a claim for the security of which there exists a lien, by which agreement he is to have an equal lien to that paid off, whereupon he is entitled to the benefit of the security which he has satisfied with the expectation of receiving an equal lien.⁵⁹

58—*Rose v. Walk*, 149 Ill. 60.

Citing: *Home S. Bank v. Bierstadt*,

59—*Novak v. Kruse*, 288 Ill. 363.

168 Ill. 618; *Bishop v. O'Connor*, 69

§ 2101. Subrogation of Junior to Senior Mortgagee—

Where a junior incumbrancer, in order to protect his own security, is compelled to discharge a prior mortgage, he will in equity become subrogated to the rights of the holder of the prior incumbrance. In such case the person discharging the superior lien will be treated as its purchaser or assignee, unless the facts show that it was intended as an absolute payment.⁶⁰

Where a person has an interest in property, but is not primarily liable for the payment of the mortgage debt upon the same, if he pays it he is entitled to an assignment of the mortgage or to be subrogated to the rights of the mortgagee.⁶¹

A mortgagee who has paid a prior mortgage or other incumbrance upon the land is entitled to be paid the amount thereof, as well as his own mortgage, when the mortgagor comes to redeem. In addition to the rights the mortgagee had before, he is subrogated to those which were a charge upon the land in the hands of the prior incumbrancer whom he has paid, whether such incumbrance is a mortgage, judgment or a rent charge. And he is entitled to be thus subrogated although the payment by him was voluntary and not compelled to do so in order to protect his rights.⁶²

As to the right of subrogation in favor of personal sureties on a note secured by a mortgage on real estate, the rule is, that it would depend as to whether or not the surety had first discharged the principal debt, and whether there are any superior equities in favor of other parties attaching to the mortgaged property. The substance and the right of the matter should be considered, and its proper solution should be controlled by equitable principles.⁶³

Ill. 431; *Borders v. Hodges*, 154 Ill. 498; *Coe v. Maryland Ry. Co.*, 31 N. J. Eq. 105; *Tyrrill v. Ward*, 102 Ill. 29; *Tradesman's Ass'n v. Thompson*, 32 N. J. 133.

61—*Thomas v. Home M. B. L. Ass'n*, 243 Ill. 550.

62—*Gipps Brewing Co. v. Wasson*, 193 Ill. App. 158.

63—*Jackson v. May*, 28 Ill. App. 305.

60—*Illinois Nat. Bank v. School Trustees*, 211 Ill. 500.

In equity a vendee who discharges a debt of his grantor secured by mortgage upon the premises purchased by applying the purchase money thereto is entitled to be subrogated to the rights of the mortgagee, although the mortgage is formally released.⁶⁴

One who advances money to discharge the debt of another, in the absence of any agreement, either expressed or implied, for subrogation, will not be entitled to succeed to the rights of the creditor so paid, unless there is some obligation, interest or right, legal or equitable, on the part of such person in respect to the matter concerning which the advance was made, as otherwise he is a stranger, a volunteer, an intermeddler, to whom the equitable right of subrogation is never accorded.⁶⁵

If a third person, having no interest in the mortgaged properties, voluntarily pays the indebtedness secured by the mortgage, he is not entitled, merely by the fact of such payment, to be subrogated to the rights of such mortgage.⁶⁶

§ 2102. Expenses Incurred in Protecting Mortgaged Property—A mortgagee or trustee in a trust deed is liable at any time to be called upon to protect his interest in the real estate incumbered. If the trust deed or mortgage so provides, the debtor can be required to repay all necessary expenses incurred, such as attorney's fees, by the trustee or mortgagee in protecting the interest of the creditor. If the creditor has not taken the precaution to have such a provision inserted in the trust deed or mortgage, then he must bear the expense of such litigation himself.⁶⁷

§ 2103. Proper Decree in Contests Between First and Second Mortgagees—Where a second mortgagee files a bill to foreclose his mortgage and makes the first mortgagee a party thereto, who sets up his mortgage and the amount

64—Young v. Morgan, 89 Ill. 199.

67—Wachs v. Broomell, 274 Ill. 45.

65—Bouton v. Cameron, 205 Ill. 50.

66—Doxey v. Western State Bank,
113 Ill. App. 442.

due thereon, but does not ask for any relief, it is error for the decree to provide that the first mortgagee be barred and foreclosed from all equity of redemption in case of a sale of the mortgaged premises under the decree. The decree should provide that the sale be made, subject to the incumbrance of the first mortgage.⁶⁸

A junior mortgagee is not compelled to foreclose a prior mortgage. It is the privilege of the prior mortgagee to foreclose it or not as he shall see fit.⁶⁹

§ 2104. Reference to Master in Chancery and Master's Report—It is usual in foreclosure proceedings to refer the case to a master in chancery with directions to him to take the evidence, state an account and report the evidence and his conclusions of law thereon to the court. If, in the opinion of either of the parties, the evidence offered before the master is incompetent or insufficient to support his findings, he is required to file objections to such report before the master, and, if the same are overruled there, to renew such objections as exceptions to the report before the court. Unless this course is pursued questions as to the competency or sufficiency of the evidence cannot be considered in a court of review.⁷⁰

A master in chancery in rendering his report and charges for services on a reference should itemize his account. The fees allowed by statute should be stated and if services are rendered for which the fees are not fixed by the statute, but are left to the determination of the chancellor, the report should state such services, and also should show whether such costs have been paid, and if paid, by whom. A general statement of the master's fees, as "Master's Fees \$125," cannot be taxed as costs.⁷¹

§ 2105. Variety of Relief Afforded by Courts of Equity—The great advantage to be gained in foreclosure proceed-

68—*Bortree v. Macon*, 121 Ill. App. 111.

69—*Garrett v. Peirce*, 74 Ill. App. 225.

70—*Cheltenham Improvement Co. v. Whitehead*, 128 Ill. 279.

71—*Healy v. Protection L. I. Co.*, 213 Ill. 99.

ings in a court of equity is the variety of relief which the court may afford the parties in the same suit, and its power to settle and adjust by its decree the equities between the parties. So, in a bill to foreclose a trust deed, in the nature of a mortgage, if the court obtains jurisdiction of the parties and the subject matter, it may proceed to render complete justice on equitable terms between the parties, and although it may find that the defendant is not bound by the trust deed, but is liable upon the notes, the court may render a personal judgment against the defendant for the amount of the notes, and deny the foreclosure of the trust deed, but require the payment of the judgment as a condition to the release of the trust deed, under the prayer of the defendant in his cross-bill.⁷²

If a mortgagor and maker of a promissory note files a bill to remove the mortgage as a cloud upon his title, and to cancel the note, for the reason that no consideration was received therefor, alleging that the assignee of the note had full notice of that fact and the defendant answers the bill and claims to be an innocent holder of the note for value, and denies any knowledge of the alleged equities of the complainant, and after answering files a cross bill for the purpose of procuring a money decree against the maker of the note for the amount thereof, the court may render a decree in favor of the complainant in accordance with the prayer of the bill so far as the mortgage is concerned, but it may also render a decree in favor of the cross complainant for the amount due on the note against the maker thereof. Although the matters set up in the cross bill may be purely legal, the complainant having brought the defendant into a court of equity, upon matters exclusively cognizable in a court of equity, cannot be heard to question the jurisdiction of the court over the matters set up in the cross bill. It being germane to the original bill, it would seem to be highly inequitable to require the defendant to institute

72—*Bourke v. Hefter*, 202 Ill. 321.

another suit at law, merely for the purpose of obtaining a judgment at law upon the note, when a court of equity has before it the proper parties and the subject matter to enable it to do complete justice between the parties.⁷³

§ 2106. Decree of Foreclosure—A decree of foreclosure should properly state as follows: (1) The names of the parties to the suit in full; (2) a recital that the complainant appeared by his solicitor; (3) that the defendants, such as have not been defaulted, also appeared by their solicitor; (4) that the cause came on to be heard on the bill of complaint theretofore taken as confessed by and against the defendants against whom defaults had been taken—naming them—the answers of the defendants who have answered—naming them—and in case there be minor defendants stating that they—naming them—answered by their guardian *ad litem*, theretofore appointed by the court—naming him—and the replication of the complainant to such answers, and upon evidence heard in open court. In case the cause has been referred to a master in chancery then “upon the report of such master in chancery filed herein,” stating the date of such filing, and stating that the cause had been referred by the order of court to such master in chancery to take proofs therein and report the same to the court with his opinion on the law and the evidence.

(5) If there be exceptions taken to the master’s report they should be disposed of according to the facts in the case by the order of the court, either overruled or sustained or partly overruled or partly sustained, so as to leave the court free to proceed with the case. The common order sustaining the report is as follows:

“On motion of the complainant’s solicitor it is ordered that the master’s report be and the same is hereby in all things approved and confirmed.”

(6) A recital that the cause has been argued by counsel

73—Zollman v. Jackson, T. & S. Bank, 238 Ill. 290.

for the various parties, and the court is fully advised in the premises, and finds that it has full and complete jurisdiction of the subject matter and over the parties to the cause; if jurisdiction of the person of any of the defendants is obtained by the publication of notice of the pendency of the suit, it would be well to have a full and particular finding in this regard; that the material allegations of the bill are true and sustained by the evidence, and that the equities of the case are with the complainant, and that there is due to the complainant upon the securities mentioned and described in the bill and mortgage a certain sum of money—naming it. (7) Then there should follow a specific finding of fact as to every material allegation in the bill which it is necessary for the complainant to prove in order to entitle him to the relief sought; there should be a particular finding of the parties who are personally liable for the payment of the securities mentioned in the bill and mortgage, either as the makers of the same or on account of having assumed the payment thereof. All of this is advisable because of the rule in chancery which requires that the facts, or the evidence of the facts, on which the decree is based, should appear affirmatively in the record. There are a number of well considered cases which hold that the general finding that the material allegations in the bill are true is not sufficient of itself to sustain the decree; this is also desirable because it relieves the complainant of the necessity of preparing and securing the signature of the chancellor to a certificate of evidence, as he would be bound to do if no such finding were made. Where the facts are thus fully found in the decree, if the defendant is of the opinion that the evidence does not sustain such finding, then he should prepare a certificate of evidence himself, and procure it to be signed and filed. He will then on appeal be prepared to attack such findings. If there be no certificate of evidence containing all the evidence offered and heard at the trial, the findings of the court will be

sustained in the court of review. It may be remarked here that if all the evidence heard in the case appears in the master's report, a certificate of evidence is not necessary, nor are the specific findings in the decree necessary, but it is advisable, however, that they should be contained in the decree to prevent the misfortune which might arise from the loss or destruction of the master's report.

That part of the decree containing the findings of the court is known as the "finding part" of the decree. (8) The "decreetal part" of the decree commences, "It is therefore, Ordered, Adjudged and Decreed" that unless the defendant—naming him—or some of the defendants within the time therein mentioned—usually ten days—from the date of the entry of the decree, pay or cause to be paid to the complainant, the said sum—mentioning it—with interest thereon at the rate of five per cent per annum, from the date of the decree to the day of such payment, and pay the officers of the court the taxed costs in the case, then the premises thereafter and in the bill of complaint mentioned and described, or so much thereof as may be necessary to pay the amount found to be due the complainant, with interest thereon, and the costs aforesaid, and which may be sold separately and without material injury to the parties interested, be sold at public vendue to the highest and best bidder for cash by the master in chancery—naming him—at a certain place therein mentioned; that the said master in chancery give public notice of the time, place and terms of such sale in the manner directed by the decree for the length of time therein specified. The time, place and terms of such sale, and the notice to be given thereof, are all regulated by the decree; the provisions of the statute in regard to sales on executions at law have no application to sales in chancery; that the complainant, or any party to said cause, may become the purchaser at such sale; that upon the sale being made that the said master execute to the purchaser or purchasers at such sale a certificate or

certificates of sale, evidencing such purchase, describing the premises purchased, the amount paid therefor, or, if purchased by the complainant, the amount of his bid, and the time such purchaser or purchasers will be entitled to a deed for said premises, if the same shall not be redeemed according to law, and within ten days from such sale he file a duplicate of such certificate or certificates in the office of the recorder of deeds of the county.

That said master out of the proceeds of such sale retain his fees, disbursements and commissions therein, and pay to the officers of the court their costs in the case, and out of the remainder pay to the complainant the amount by this decree found to be due him, with interest thereon at the rate of five per cent per annum from the date of the decree to the date of such sale; that if such remainder shall not be sufficient to pay such amount and interest, that he apply the same to the extent it may reach in satisfaction thereof, and specify the amount of the deficiency in his report of such sale, and if such remainder shall be more than sufficient to pay the said amount and interest, then that he hold the surplus subject to the order of the court; that he take receipts from the respective parties to whom he may have made payments as aforesaid, and file the same with his report of sale with the court.

"It is Further Ordered, Adjudged and Decreed," that upon the expiration of fifteen months after the date of such sale, if the premises so sold shall not be redeemed according to law, the defendants and all persons claiming under them or any of them, since the commencement of this suit, be forever barred and foreclosed of and from all right or equity of redemption or claim of, in or to said premises or any part thereof, and in case said premises so sold shall not be redeemed as aforesaid, then upon the production to the master, or his successor in office, of the said certificate or certificates of sale by the legal holder thereof, the said master shall make, execute and deliver to the legal holder

of such certificate or certificates a good and sufficient deed or deeds of conveyance of said premises, and that upon the grantee or grantees of such deed or deeds, or his or their legal representatives or assigns, be let into the possession of said premises, and that any of the parties to this cause, who shall be in possession of said premises, or any portion thereof, or any person who may have come into possession under him or them or any of them, since the commencement of this suit, upon the production of the master's deed of conveyance, and a certified copy of the order of the court, confirming said sale, surrender the possession of the premises to said grantee or grantees, his or their representatives or assigns.

"The premises by this decree authorized to be sold are situated in"—here name the city, town, county and state—"and are described as follows": here describe the premises the same as described in the bill.

In case the mortgage provides for the allowance to the complainant of a solicitor's fee where there is a foreclosure of the mortgage, a special finding in that regard should be included in the decree. Such a finding may be as follows:

"And it appearing to the court that the mortgage mentioned in the bill of complaint herein provides for the allowance to the complainant of a—here state the substance of the mortgage in this regard, which differ in the various forms of mortgages—the court finds that the complainant has paid, or has contracted or become liable to pay, the sum of dollars for the services of his solicitor herein, which the court finds from the evidence heard in open court, is a reasonable, ordinary, usual and customary fee and charge for the services of such solicitor in such cases, rendered and to be rendered herein. It is Therefore, Ordered, Adjudged and Decreed by the court, that the complainant, in addition to the sum above found to be due the complainant be allowed the further sum of dollars as and for his reasonable solicitor's fee to be paid by the said defend-

ant—the maker of the mortgage—or out of the proceeds of the sale in case the said defendant fails to pay the same, should said premises be sold hereunder” or, after the words “solicitor’s fee,” add the words, “to be taxed as costs herein,” according to the peculiar provisions of the mortgage.

There are many things included in the foregoing suggestions which are not absolutely necessary for a good and legal decree; but they are all very desirable, and should be included in the decree, in order to protect the various interests of the several parties.

§ 2107. Nature of Findings in Decree—The findings in that part of a decree known as the “finding part,” is nothing more than the preservation of the evidence in support of the decree. There must be some decree based upon such findings before anyone is bound by them; this should be done in what is known as the “decreetal part” of the decree.⁷⁴

Where the decree specially finds every material allegation in the bill to be true, it follows that if the facts alleged in the bill are sufficient to sustain the decree, the court is justified in rendering it.⁷⁵

§ 2108. Findings as to Several Tracts Liable for Different Sums—If several mortgages upon separate parcels of land are joined in one bill of foreclosure, it is erroneous to consolidate the whole amount due on all the mortgages in one sum, and provide for the sale of the lands for such aggregate sum. The decree should find the amount due on each separate mortgage.

If it does not appear that any objection was made to the joining of the mortgages in one foreclosure proceeding, either by any of the parties or by the court, by which it may be inferred that circumstances may be such that several mortgages may be joined in one proceeding.⁷⁶

⁷⁴—*Hopkins v. Cofoid*, 103 Ill. App. 167.

⁷⁶—*Knight v. Heafer*, 79 Ill. App. 374.

⁷⁵—*Binkert v. Wabash Ry. Co.*, 98 Ill. 205.

§ 2109. Computation of Interest on Entry of Decree—The rule in Illinois in computing interest on partial payments is as follows: The interest is to be calculated upon the principal sum up to the time of the first payment; this is to be deducted from the payment and the remainder, if any, credited upon the principal of the debt; and so on during all the payments; if the amount paid at any time is not equal to the interest, then the interest is computed to the next payment, when, if the payment then equals the interest then due, it is deducted from the payment and the remainder credited on the principal as before. And thus the process is continued until all the payments are disposed of.⁷⁷

In the entry of a decree in the computation of interest on the indebtedness it should be computed on the principal debt, and not on the amount found due by the master in his report, as that may include interest, and by computing interest from the date of the master's report on the amount found due by him interest on interest may be the result.⁷⁸

§ 2110. Form of Decree Where First Mortgagee is Party Defendant—Where a first mortgagee is made a party defendant to a bill to foreclose a second mortgage, the decree should provide for the sale of the premises subject to the lien of the first mortgage.⁷⁹

§ 2111. Form of Decree Where Second Mortgagee is Made Party Defendant to Foreclosure of First Mortgage—In a proceeding to foreclose a first mortgage, to which the second mortgagee is made a party, it is not necessary that the decree should specifically provide for the foreclosure of both mortgages, or specifically subject the premises to sale for the payment of the amounts due on both mortgages.⁸⁰

§ 2112. Decree on Past Due Interest Note—Sale Subject to Continuing Lien of Subsequent Notes—In a proceeding

77—McFadden v. Fortier, 20 Ill. 509.

78—Arneson v. Haldane, 105 Ill. App. 589.

79—Hibernian Banking Association v. Law, 88 Ill. App. 18.

80—Cohn v. Frank, 96 Ill. App. 206.

to foreclose a past due interest note the decree may direct that the sale of the premises be made subject to the continuing lien of the mortgage or trust deed thereon: Such decrees are clearly recognized by the courts.⁸¹

§ 2113. Complainant Only Entitled to the Actual Amount Due—The complainant in a foreclosure proceeding is only entitled to a decree for the actual amount due on the indebtedness secured by the mortgage. And if the party liable for such indebtedness has made any payments thereon or is otherwise entitled to credits the same should be allowed him in the decree.⁸²

Unless there is a clause in the mortgage or trust deed specially allowing the mortgagee or trustee the costs of an abstract of title and expenses incurred in procuring data to foreclose the same the court has no power to allow such claim.⁸³

In a foreclosure proceeding there may be included in the decree any amounts expended by the mortgagee for taxes, insurance and the extension of the abstract, where the mortgagee is authorized to make such expenditures, and they are shown to have been made by him by the evidence.⁸⁴

§ 2114. Right of Defendant in Default—A defendant in default in a chancery proceeding has an undoubted right to attend before the master and cross-examine the witness. This right has been passed upon many times by the courts. By so doing the defendant in default does not waive any rights he has under demurrer filed by him.⁸⁵

§ 2115. Decree of Sale is in Rem, Not in Personam—Where the decree finds the amount due on the indebtedness and directs that the defendants or some of them pay the amount within a time limited, and if the defendants do not

81—Schlatt v. Johnson, 85 Ill. App. 445.

82—Peacock v. Phillips, 247 Ill. 467.

83—Cheltenham Improvement Co. v. Whitehead, 128 Ill. 279.

84—Loughridge v. Northwestern M. L. I. Co., 180 Ill. 267.

85—Jocelyn v. White, 201 Ill. 16.

so pay the same then, that the premises be sold to satisfy the same. Such a decree is not considered a personal decree, but one in the alternative only.⁸⁶

While an indebtedness may be declared against the defendant and the same ordered to be paid by him, still it is not a decree *in personam*; the consequences of a default in respect to its payment is limited and confined by the decree to a sale of the mortgaged premises.⁸⁷

A party defendant cannot complain that the decree entered in a foreclosure proceeding did not provide for the payment of the money found due by him, but only provided that in case of default that the premises be sold. This is the proper form of a decree *in rem*.⁸⁸

A judgment or decree is strictly *in rem* when it is not rendered against a specific person, but against all whom it may concern, and binding on third persons. But a bill to foreclose a mortgage or lien is not strictly *in rem*. The object of such a proceeding is to reach and dispose of property, but the proceeding is for the enforcement of an obligation *ex contractu*, against a specific person and to foreclose his equity of redemption.⁸⁹

§ 2116. Binding Force of Decree on Third Parties—One who is not a party to a case in which a decree is rendered, and who does not claim under it, but adversely to it, is not bound by it, and it establishes nothing as to him, except the mere fact that it was rendered. It may be true that any one claiming under it might, in action in ejectment, against one claiming adversely to it, offer it in evidence as a link in his chain of title. Subject to these limitations it is not understood that a decree is of any binding force upon any one who is neither a party nor privy to it.⁹⁰

86—Fountain v. Walther, 66 Ill. App. 529; Dates v. Winstanley, 53 Ill. App. 623.

87—Phelan v. Iona Savings Bank, 48 Ill. App. 171.

88—Schaffner v. Appleman, 170 Ill. 281.

89—Lohmeyer v. Durbin, 213 Ill. 498.

90—Scates v. King, 110 Ill. 456; Christie v. Burns, 83 Ill. App. 514.

§ 2117. Construction of Several Orders Simultaneously Entered—Although certain motions and orders may not be joined together as one proceeding, yet where all are parts of the proceedings of the court in the same case on the same day, they will have the same effect as though they were all joined together in one decree, and they will be so regarded.⁹¹

§ 2118. Allowance of Solicitor's Fees Rests Wholly on Contract—It has been uniformly held in this state that in the absence of a statute authorizing the allowance of an attorney's fee to the plaintiff's counsel, and in the absence of a contract between the parties to that effect, none whatever can be assessed against the defendant,—in other words that the allowance of an attorney's fee in this State rests solely upon the provisions of the law or on a contract between the parties. If no attorney's fee is agreed upon none can be allowed, and if there is an agreement to pay a certain amount that amount limits the allowance, and it cannot be increased, though, if unreasonable, it might be diminished.⁹²

Where it is provided in a mortgage or trust deed that "..... per cent on the amount of such principal, interest and cost for an attorney's or solicitor's fee" amounts to nothing more than that nothing shall be paid therefor. No one, not even the chancellor, has authority to fill the blank. If it were filled that act would be a material alteration of the instrument and would render it void. And where this specific provision is of no avail, the complainant cannot support his decree in this particular by any general provision contained in the mortgage or trust deed relating to costs and attorneys fees incurred or paid by him in any suit.⁹³

Where a trust deed provides that in case of default in the payment of the debt secured thereby it may be lawful

91—*Hopkins v. Cofoid*, 103 Ill. 167.

93—*Johnson v. Clegg*, 121 Ill. App.

92—*Hanke v. Gunzenhouser*, 195 Ill. 550.

Ill. 130.

for the trustee "in his own name or otherwise" to file a bill to foreclose the same, and secure a decree for the sale of the premises, and out of the proceeds thereof to pay a solicitor's fee the fact that the bill was filed in the name of the holder of the note instead of in the name of the trustee will not prevent the allowance of a solicitor's fee. By the provisions of the trust deed a solicitor's fee was to be allowed upon the filing of a bill in the name of the trustee or "otherwise." Some meaning must be given to the word "otherwise." It cannot be arbitrarily rejected.⁹⁴

§ 2119. Solicitor's Fees Not Allowed for Unnecessary and Useless Services—By a provision in the mortgage allowing the mortgagee, in case of the foreclosure thereof, a reasonable solicitor's fee it is not intended thereby to allow a solicitor's fee for unnecessary and useless services, however extensive and laborious. It is only intended to pay for services necessary, and contributing to a decree for the sale of the land to satisfy the mortgage. So where a mortgage holding a second incumbrance upon the premises was made a party defendant to a bill to foreclose the first mortgage, no bill or cross bill, or even an answer is necessary to protect the rights of the second mortgagee; even if he does not answer, he can prove his claim and be let in to have satisfaction thereof out of the surplus.

In foreclosure proceedings where junior mortgagees and incumbrancers are made parties defendant, a cross bill is unnecessary, unless affirmative relief is sought. The foreclosure of a prior incumbrance affords relief to all subsequent incumbrancers, as they have the right, when made parties defendant, to participate in the distribution of the surplus. This is the settled doctrine of the Supreme Court of Illinois, and there is not the slightest necessity for the filing of a cross bill in such a case.

The filing of an answer and a cross bill in such a case

⁹⁴—Cheltenham Improvement Co. Brown, 167 Ill. 293; Healy v. Protection F. I. Co., 213 Ill. 99.
v. Whitehead, 128 Ill. 279; Fuller v.

does not fall within the provision of the mortgage, as the second mortgagee, on a mere motion, without an answer, could have his claim referred to a master to hear evidence and report, which would have involved a very trifling expense, even had a solicitor been employed therefor, nor would such services and employment fall within the stipulation contained in the mortgage. And a decree allowing a solicitor's fee for filing a cross bill in such a case was reversed.⁹⁵

§ 2120. Amount of Solicitor's Fees a Question of Fact to be Determined by the Evidence—What is a reasonable and proper amount to be allowed as a solicitor's fee in a given case is a question of fact to be determined by the evidence in the case. The amount which should be allowed as solicitor's fees is not controlled by percentage alone, or simply by the amount involved, or by the locality, but by all the facts and circumstances. It is to be presumed that the witnesses testifying as to the value of the services took all these things into consideration.⁹⁶

It seems to be the invariable practice in foreclosure to take the proofs as to the value of solicitor's fees with the other proofs in support of the bill. In taking proofs at that time it is necessary to anticipate the work thereafter to be done by the solicitor, and it is entirely proper for the witness on the part of the complainant to state in detail, such necessary work, and if he fails to do so, then the cross-examiner may ascertain what services thereafter to be performed are covered by the fees fixed by the witness. After the hearing and prior to the passing of the decree, if it appear to the court that the after required services were not performed, or that services were rendered which were not anticipated, it will be proper to again refer the matter to the master that he may take evidence and make a finding that will fix the fee at a proper amount. In a

⁹⁵—*Soles v. Sheppard*, 99 Ill. 616;
Cohn v. Frank, 96 Ill. App. 206.

⁹⁶—*Follensbee v. Northwestern M.
L. I. Co.*, 87 Ill. App. 609.

foreclosure suit the duties of the complainant's solicitor are not ended in a case of a sale, until he has attended upon the sale, secured the distribution of the proceeds of the sale, and a decree entered approving the master's report of sale and striking the case from the docket. It is impossible, therefore, that the taking of testimony to fix the value of the solicitor services should be postponed until all the services are rendered.⁹⁷

Where the mortgagor contracts to pay a reasonable solicitor's fee in case of foreclosure of the mortgage, such an agreement amounts to an agreement to pay the usual and customary fee for services so to be rendered, and it is quite manifest that the proportion the fee is to bear to the amount involved furnishes no just basis, by itself, for determining what is a reasonable fee.⁹⁸

§ 2121. Amount of Solicitor's Fees Specified in Mortgage—Where an amount is stipulated by the parties to a mortgage or trust deed as a solicitor's fee in case of a foreclosure thereof, and it does not appear the amount so stipulated was inserted in the instrument as a cover for usury, or that it is unreasonable or excessive, the parties to the instrument are concluded by the amount agreed upon.⁹⁹

§ 2122. Solicitor's Fee Allowed on Cross-Bill Filed by Prior Mortgagee—Where a second mortgage seeks foreclosure, subject to a prior mortgage, without making the prior mortgagees parties to the bill or in any way seeking to affect their interest, the prior mortgagees may be permitted to answer the bill and file a cross-bill to foreclose their mortgage, and upon foreclosure being allowed thereon a solicitor's fee may be allowed in pursuance with the provisions of the prior mortgage, and included in the amount found due thereon.¹

97—Unity Co. v. Equitable Trust Co., 204 Ill. 595.

98—Watson v. Jones, 101 Ill. App. 572.

99—Baker v. Allberg, 183 Ill. 258.

1—Town v. Alexander, 185 Ill. 254; Schaffner v. Appleman, 170 Ill. 281.

§ 2123. Solicitor's Fee Not Allowed Where the Complainant is His Own Solicitor, or Where He is a Member of the Firm of Solicitors or is an Officer of the Corporation Filing the Bill—It is well settled that a trustee in a trust deed is not allowed a solicitor's fee for professional services rendered by him in foreclosing the trust deed, and the same rule applies to a mortgagee foreclosing a mortgage. And no allowance will be made to a firm of solicitors of which the mortgagee or trustee is a member if the amount to be allowed is to be shared by the firm. Where in such case, the solicitor is the partner of the trustee or mortgagee it cannot be presumed that the professional services rendered were not for the benefit of the firm. It is against public policy that an attorney should be allowed fees for his own services in his own case. And this is the rule, although the instrument may provide for the allowance of a reasonable solicitor's fee for the complainant in case of the foreclosure thereof.²

Where the complainant in a bill of foreclosure is a corporation and its solicitor is a director or officer of the corporation, an allowance of a solicitor's fee in the foreclosure proceeding is reversible error, although no provision is made by the corporation for the payment for extra services rendered by him in its behalf.³

Where the mortgage contains a provision for the allowance of an attorney's fee in case of foreclosure, and the defendant offers no evidence whatever as to the right of the complainant to recover it, and the only point made against it is that the complainant signed the bill as solicitor, but it appeared in the litigation which followed that he was represented by other solicitors, on such facts it is not error for the trial court to allow a solicitor's fee.⁴

§ 2124. Solicitor's Fees May be Allowed Where Successor in Trust Acts as Complainant's Solicitor—Although the

2—Gray v. Robertson, 174 Ill. 242;
Stein v. Kaun, 244 Ill. 32; Garrett
v. Peirce, 74 Ill. App. 225.

3—Gale v. Carter, 154 Ill. App. 478.

4—Barry v. Guild, 126 Ill. 439.

attorney for the complainant is named in the trust deed as successor in trust, yet if the contingency upon which he was to act as such successor in trust never happened and he never acted as trustee, he may act as the solicitor for the complainant in the foreclosure proceedings and a solicitor's fee allowed therefor to the complainant.⁵

§ 2125. Chancellor to Determine Amount of Solicitor's Fees—In taxing solicitor's fees the chancellor should exercise his own judgment and not be governed wholly by the opinions of attorneys as to the value of the services. He has the requisite skill and knowledge to form some idea as to what is a reasonable compensation, and he should exercise that judgment.⁶

§ 2126. Solicitor's Fee May be Modified in Supreme Court—Where a decree of foreclosure is confirmed by the Supreme Court, except as to the allowance of an attorney's fee in favor of the mortgagor, a decree in favor of the mortgagee and against the mortgagor for the amount of the solicitor's fee and interest thereon may be entered by the Supreme Court.⁷

§ 2127. Duty of Defendant to Tender Reasonable Amount for Services Already Rendered by Solicitor to Save Further Costs—If the mortgagor desires to relieve himself from further costs and expenses in a foreclosure proceeding, if the mortgage provides for the payment of a solicitor's fee in case of a foreclosure thereof, he should offer to pay a reasonable fee for the services already performed.⁸

Where a party tenders a sum as and for a reasonable attorney's fee for the purpose of stopping the litigation he must, if the amount is declined, keep the tender good; and by placing the same in his general banking account, until the same is reduced below the amount tendered, he fails to so keep the tender good.⁹

5—Kehm v. Mott, 187 Ill. 519.

8—Fuller v. Brown, 167 Ill. 293.

6—Healy v. Protection F. I. Co.,
213 Ill. 99.

9—Healy v. Protection L. I. Co.,
213 Ill. 99.

7—Soles v. Sheppard, 99 Ill. 616.

§ 2128. Necessity of Averment in Bill in Regard to Allowance of Solicitor's Fee—It is error to allow an attorney's fee in a foreclosure suit unless there is some averment or prayer in the bill concerning the matter. If the mortgage makes provision for an attorney's fee in the event of a foreclosure, and the bill makes the mortgage or a copy of it a part of the bill then the prayer for an accounting to ascertain the amount due would justify the taking of proof as to such fee and its allowance in the decree; but where there is no allegation in the bill as to such attorney's fee, and the mortgage is not made a part of the bill, the allowance of such a fee is reversible error.¹⁰

Where the mortgage authorizes the allowance of a reasonable attorney's fee for foreclosing the same, and the bill prays that an accounting may be had and taken and that the defendant may be decreed to pay whatever sum may appear to be due on the taking of such an accounting, a statement of the account would include the solicitor's fee provided in the mortgage, although the bill did not pray therefor, nor a copy of the mortgage attached to the bill nor made an exhibit thereto.¹¹

§ 2129. Solicitor's Fee May be Included in Amount Found Due Under Mortgage—It is not error to include the amount of the solicitor's fee in the amount found due by the decree and then provide that the aggregate amount shall bear interest until paid.¹²

Where a mortgage or trust deed provides that in case of a foreclosure thereof a certain amount shall be allowed the complainant as and for his solicitor's fee in the foreclosure, and where a claim is set up in the bill for the allowance of such an amount as complainant's solicitor's fees, and the evidence shows that the amount specified is a reasonable charge, and the amount agreed upon was not inserted

10—*Knight v. Heafer*, 79 Ill. App. 374.

12—*Healy v. Protection L. I. Co.*, 213 Ill. 99.

11—*Dates v. Winstanley*, 53 Ill. App. 623.

as a cover for usury, it is not error for the court to allow as such solicitor's fees the sum agreed upon by the parties.¹³

§ 2130. Questioning the Allowance of a Solicitor's Fee Must be Brought Before the Court of Review in a Proper Manner—Where the question of the propriety of the allowance of an attorney's fee in a foreclosure proceeding is not brought before the court of review in a proper manner the correctness of such an allowance cannot be considered by the court.¹⁴

§ 2131. Fixing Time of Payment of Amount Found Due—It is usual, and the better practice, to incorporate in a decree of foreclosure a limitation of time for which the party liable to pay the indebtedness may pay the debt before a sale may be advertised. But there is no statutory requirement that this shall be done, and it remains a matter of discretion with the chancellor, and the failure to do so is not an error which will work a reversal.¹⁵

§ 2132. Sale and Terms of Sale—The decree in a foreclosure case should fix the time, place and terms of sale, and the notice of the sale should correspond with such requirements.

Where the decree directs a foreclosure sale to be made at public auction for cash, and in the absence of any special directions as to the manner of payment, a sale cannot be said to be made for cash, when a bidder after making a bid which is accepted, goes off without making any offer to make any payment whatever or any arrangement for payment. When a bid is made by the complainant in a foreclosure proceeding and the amount bid does not exceed the amount due the complainant under the decree, the requirement that the sale shall be made for cash is satisfied to the same extent as if paid in money when the amount is credited upon the decree, and the complainant need not

13—Heffron v. Gage, 149 Ill. 182.

15—Gardner v. Cohn, 191 Ill. 553.

14—Fountain v. Walther, 66 Ill.

App. 529.

pay his bid in cash. This is not so, however, when the bid is made by a third party bidding for himself.¹⁶

The complainant in a foreclosure proceeding has the same right to bid at the sale as any other person, and the fact that the complainant became the purchaser at such sale does not give him any rights, nor does it take away from him any rights, which otherwise he would have.¹⁷

§ 2133. Notice of Sale in Foreclosure—Where the decree in foreclosure requires that the notice of the sale shall contain the names of the parties to the suit “as aforesaid,” such requirement is fulfilled where the notice shall contain the names of the parties mentioned in the decree, and not the names of such as are not so contained.

And a mistake in the master in publishing the notice of sale in a foreclosure suit in giving the wrong Christian name of one of the parties, will not invalidate the sale, where the party is only a trustee of a person, and the general docket number of the case is given, together with the date at which the decree was entered—and specially where the property sold for all that it was worth.¹⁸

§ 2134. Notice of Sale to Conform with Requirements of Decree—In ordering the sale the court exercises its judicial discretion as to the time and manner in which notice of the sale shall be given, and the master has no discretion, but is bound to execute the decree as made. It is essential to the validity of a sale that the notice thereof shall be given as directed, and a court is not authorized to approve of a sale where the master has not given the notice required by the decree. The decree constitutes the sole authority of a Master in Chancery to make the sale, and unless he follows the authority the sale cannot be made or approved. A court of equity, having regard to the stability of judicial sales, will not always interfere to vacate the sale for a want

16—Slack v. Cooper, 121 Ill. App. 485.

18—Field v. Brokow, 159 Ill. 560.

17—Innes v. Linscheid, 126 Ill. App. 27.

of strict compliance with the requirements in regard to notice, after the lapse of a considerable time; and in a case where no objections were made to the manner in which the notice was given for a period of over ten years after the sale was approved, it was held that the court should not set aside the sale, unless a positive injury were shown. But where the objection is made on the filing of the report of the master, before confirmation, the sale should not be approved, if the notice has not been given in pursuance with the decree.¹⁹

§ 2135. Sale in Separate Tracts—Section 12 of chapter 77 of the Revised Statutes, provides that when real or personal property is taken on execution if the same is susceptible of subdivision, it shall be sold in separate tracts, lots or articles, and only so much shall be sold as is necessary to satisfy the execution and cost; but this statute applies only to sales on execution; there is no such statute with reference to sales on the foreclosure of mortgages. It is, however, the duty of the officer making such sale, to sell the property to the best advantage, so that it will bring the most money, and that no more property may be sold than is necessary to satisfy the debt and cost.

The officer, however, is not required to subdivide a quarter section into eighties, or forties, and offer such smaller tract first for sale, where the mortgage foreclosed is on the larger tract.

Where the lots are numbered consecutively, it may fairly be presumed that they are adjacent to each other. But where their size, situation and condition is not shown, and the only evidence of their divisibility grows out of the fact that on the plat the property is shown to be divided into lots, still it may, nevertheless, so far as appears, be incapable of division for the purposes of sale. In the absence of proof the court of review cannot know that the property was capable of division for the purpose of sale.²⁰

19—Quick v. Collins, 197 Ill. 391.

20—Dates v. Winstanley, 53 Ill. App. 623.

Where the decree of sale directs the master to sell the property in separate tracts the attendance of a party at the sale and bidding thereat, when the property is offered *en masse* and not in separate tracts does not estop the party from objecting when the matter comes up for confirmation of the sale, that the master did not follow the directions of the decree.²¹

It has been held that where property susceptible of division is sold by an officer *en masse* at an inadequate price without first offering the same in separate parcels the sale will be set aside on application within a reasonable time. It is the contemplation of the statute relating to sales under foreclosure decrees, as well as under executions, that only so much of the property affected by the lien shall be sold as is necessary to discharge the lien, where the property is susceptible of division.

§ 2136. Sale Made in Inverse Order of Alienation by the Mortgagor—Where the mortgagor sells the mortgaged premises in parcels, at successive periods, the different parcels shall be subject to the payment of the mortgage in the inverse order of their alienation. This rule rests upon the reason that where the mortgagor sells a part of the mortgaged premises without reference to the incumbrance, purporting to convey the fee simple, and retaining a part himself, it is equitable, as between the mortgagor and his grantee, that the part still held by the mortgagor shall be first subject to the payment of the debt, and this equity having attached to the land, a subsequent purchaser from the mortgagor, with notice, takes it subject to the same equity. But it is evident that this reasoning has no application to a case where the first purchaser takes subject to the mortgage. In such case the purchaser has no equity, as against mortgagor, that the portion still held by the latter shall be first applied to the payment of the mortgage, and having no equity against him, of course, has none

²¹—*Roberts v. Goodin*, 288 Ill. 561.

against his grantee. The first purchaser by taking expressly subject to the mortgage, consents that the land conveyed to him shall remain subject to its pro rata share of the debt. The doctrine thus stated is too well settled to require the citation of authorities.²²

The rights of a purchaser from the mortgagor of a part of the property under mortgage, who has paid for his part of the property, to have all the parts of the property left in the mortgagor at the time of his purchase sold first, before subjecting his property to sale to satisfy the mortgage, is a superior right as to the mortgagor, but it is a subordinate right as against the mortgagee, and is subject to the superior right of the mortgagee to collect his money in a way that is most to the interest of the mortgagee. The purchaser from the mortgagor can hold the mortgagee to account only where the mortgagee has wantonly, or in unjust indifference to the known equitable rights of the purchaser, impaired such rights by his act, when no reasonable consideration of the interest of the mortgagee required the act to be done which is complained of.²³

The rule of law in regard to the sale of property in the reverse order of alienation is never applied to the injury of an innocent mortgagee. Before he can be required to shape his action in reference to the subsequent order of alienation he must have actual notice as to what that order is, and not merely the constructive notice derived from the registry of deeds made by the mortgagor subsequent to the mortgage. Such registry is not even constructive notice to him, and cannot affect his prior lien.²⁴

Where the decree in a foreclosure suit is entered upon the default of the defendant, and there is no actual notice to the mortgagee of any alienation by the mortgagor or

22—*Monarch Coal & M. Co. v. Hand*, 197 Ill. 288.

24—*Matteson v. Thomas*, 41 Ill. 110.

23—*Hawhe v. Syndacker*, 86 Ill. 197.

the order in which alienation, if any, was made, it is not error not to order the sale by the master to be made in the inverse order of alienation.

In order to invoke the aid and obtain the benefit of the rule applicable to an inverse order of alienation in the foreclosure of a mortgage on real estate, which subsequent to the execution of the mortgage has been sold by the mortgagor in separate tracts to different purchasers at different times, the parties interested therein must show: (1) That the mortgagee actually knew what the order of alienation was, and (2) that the purchasers requested the mortgagee to sell in that order. The rule is never applied to the injury of an innocent mortgagee. Before he can be required to shape his action in reference to the subsequent order of alienation, he must have actual notice of what that actual order was, and not merely constructive notice derived from the registry of deeds made by the mortgagor, subsequent to the mortgage.²⁵

§ 2137. Presumptions in Favor of the Regularity of the Sale—The presumption of law is, in the absence of proof to the contrary, that an officer in conducting a sale of property does his duty according to law. So, where there is an absence of proof of any fraud or injury, violation of the conditions of the decree in regard to the sale, the fact that the property was sold *en masse* is not of itself sufficient to set the sale aside.²⁶

§ 2138. Approval of Report of Sale by Court—It is the duty of the officer making the sale to report his acts and doings in regard thereto to the court entering the decree.

The chancellor, in a foreclosure proceeding, is responsible for the decrees and orders entered therein, and it is his duty to make investigations, and determine whether or not the sale as made by the master is regular, free from fraud or wrong and to the best interest of the parties concerned.

²⁵—*Dates v. Winstanley*, 53 Ill. App. 623.

²⁶—*Dates v. Winstanley*, 53 Ill. App. 623.

The master is a ministerial officer to carry out the decree of the court, and his acts are binding only when approved by the court. If the chancellor finds upon the coming in of the report of the master, that the sale as made is not for the best interest of all concerned and is inequitable, or that any fraud or misconduct has been practiced upon the master or the court or any irregularities are discovered in the proceedings, it is the duty of the chancellor to set the sale aside and order another sale of the premises. The chancellor has a broad discretion in a passing upon the acts of the master and approving or disapproving of them in reference to sales and in entering its own order or decrees. Such discretion must be exercised according to rules of law. Public policy requires stability in all judicial sales and that they should not be disturbed for slight causes, otherwise property could not be expected to bring its full value at such sales. Such a sale will not, as a rule, be set aside for mere informality or irregularity or for causes which parties complaining might with a reasonable degree of diligence have avoided.²⁷

And his decrees will not be disturbed by a court of review unless it is shown that he has abused his discretion and entered such an order or decree, as would not seem to be equitable between the parties interested.²⁸

The order of the court approving the master's sale, in which it is recited that the master in making the sale has proceeded in due form of law and in strict conformity with the decree is sufficient to meet any objection raised as to the sufficiency and regularity of the certificate of publication.²⁹

An order of a court of chancery confirming the report of a judicial sale is a final order in the case and cannot be set aside after the expiration of the term at which it was entered.³⁰

27—*Christ v. McCoy*, 287 Ill. 641.

30—*Schweinfurth v. Poeslman*, 83

28—*Slack v. Cooper*, 219 Ill. 138.

Ill. App. 428.

29—*Steele v. Wynn*, 189 Ill. App.

§ 2139. Amount of Sale Evidence of Value of Property as Security—In the absence of any fraud or irregularity in the foreclosure of a mortgage, the price at which the property is sold is the conclusive measure of its value as security for the notes secured by the mortgage.³¹

§ 2140. Objections to the Report of Sale—A party desiring to contest the validity of a sale should file objections to the report of the officer making the same.

Where no objections are filed or made in the trial court to the report of sale, and there is no evidence whatever in the record to show that any fraud was practiced in the sale, or that either of the parties were injured, or that the property was susceptible of subdivision, the appellant cannot make the objection for the first time in the court of review, that the property was sold *en masse*.³²

§ 2141. Power of Officer Conducting the Sale—Although a bid, either with or without a deposit, may be accepted by the officer conducting the sale its acceptance does not become an absolute contract until it is approved by the court.

So where there is nothing to indicate that the master intended to waive the requirement that the bidder should pay cash upon his bid, on the failure of the bidder to pay cash, the master has the right to reject the bid and again expose the property for sale.³³

§ 2142. Order of Court Approving Report of Sale—Regularly, there should be a formal order of the court confirming the report of the sale; a recital in the record that the report was approved by the court and ordered filed does not amount to such an order; it is merely a memorandum; but where the proper objection is not made in the trial court, it cannot be made for the first time in a court of review, or to the mode or manner of the sale.³⁴

31—Loeb v. Stern, 198 Ill. 371.

34—Dates v. Winstanley, 53 Ill.

32—Dates v. Winstanley, 53 Ill. App. 623.

App. 623.

33—Slack v. Cooper, 121 Ill. App.

485.

§ 2143. Setting Aside Foreclosure Sale—An application to a court of equity to set aside a judicial sale must be made within a reasonable time thereafter. So a delay of seventeen years without any reasonable excuse therefore, will be considered such laches as will defeat the relief sought.³⁵

§ 2144. Order Requiring Purchaser to Complete Sale—Appeal Therefrom—Where a purchaser at a foreclosure sale declines to complete his purchase, and an order of court is entered requiring him to do so he may appeal therefrom directly to the supreme court if the question of a freehold is involved; and such a question is involved where the question of the validity of the title conveyed by such sale is raised in objection thereto.³⁶

§ 2145. Foreclosure Sale Extinguishes Mortgage Lien—Upon a sale of the premises in a foreclosure proceeding the lien created by the mortgage is extinguished. It no longer exists. And the complainant in the foreclosure suit has secured every benefit possible to be secured under the mortgage lien.³⁷

Nor does it in any way affect the result that the holder of the secured indebtedness becomes the purchaser at the sale. By becoming the purchaser, a new relation is created by the statute, in no wise depending upon the privity of the contract between the purchaser and the mortgagor.³⁸

The sale of land under a decree of foreclosure is a sale of every interest in the land belonging to any party to the suit and discharges the land from every lien of any such party. All interests are merged in the certificate of purchase. Subsequent judgments do not become a lien upon the property.³⁹

§ 2146. Rights of Purchaser Fixed as of Date of Mortgage—The purchaser at a foreclosure sale takes the estate of

35—Kerfoot v. Billings, 160 Ill. 563. Lightcap v. Bradley, 186 Ill. 510; Haigh v. Carroll, 209 Ill. 576.

36—Fienhold v. Babcock, 275 Ill. 282.

38—Davis v. Dale, 150 Ill. 239.

39—Heinroth v. Frost, 250 Ill. 102.

37—Strause v. Dutch, 250 Ill. 326;

the mortgagor as it existed at the date of the mortgage, but neither in fact or law does such a purchaser become the assignee of the reversion, or of the term where the lease out of which such estate arises, is made after the mortgage is executed. The purchaser takes the title as it existed in the mortgagor, divested of subsequent sales, liens or leases made by the mortgagor or those claiming under him.

The mortgagor does not become the tenant of the mortgage, and the relation of landlord and tenant does not exist between the mortgagor and the purchaser at a mortgage sale, and tenants under a lease made subsequent to the mortgage may be treated as trespassers by the mortgagee or the purchaser at the mortgage sale, and ejected without notice.

And the single act of the mortgagee or purchaser in demanding rent of such tenant, will not create the relation of landlord and tenant when such demand has not been acted upon, so as to enable the mortgagee or purchaser to recover rent *eo nomine*. After such a sale, in order to create a privity of contract, there being no privity of estate between them, it requires some affirmative act by the parties evidencing an intention to recognize the former lease as still subsisting, or a new holding under the same or different terms, to enable the purchaser to recover rent as such, either by an action or by distress for rent.⁴⁰

Where a party purchases at a foreclosure sale he does so with full notice that the property is subject to annual taxes, and that one year's taxes will be levied upon the property before he will be entitled to a deed and possession.⁴¹

§ 2147. Sale After Death of Mortgagor, After Entry of Decree—Although there may be a sale under a foreclosure proceeding after the death of the mortgagor, on a decree

40—*Bartlett v. Hitchcock*, 10 Ill. App. 87.

41—*Dale v. Davis*, 51 Ill. App. 328.

rendered before his death, and there being no revival of the suit against his heirs, still such a sale is not erroneous. It is plain that the heirs of the mortgagor are not entitled to be put in a better position than the mortgagor himself.⁴²

§ 2148. Interest Taken by Purchaser at Mortgage Sale—

The purchaser at a foreclosure sale takes as a stranger whatever interest is authorized by the decree to be sold. By law, he becomes entitled to the rights, titles and interest of the mortgagor in the premises, if no redemption is made in the time and manner provided by the statute, and necessarily takes the estate charged with all its infirmities of title, and subject to all prior liens to which it would have been subject in the hands of the mortgagor. He is required to know that the mortgagor will be entitled to the possession, and the rents, issues and profits, of the premises during the running of the period of redemption, and that taxes will accrue, which would be a lien upon the property, before the time of redemption will expire, and he voluntarily purchases subject to such accruing lien.⁴³

It is not the mortgage lien which is sold but the property itself.⁴⁴

It may seem a hard rule that a purchaser at a foreclosure sale of a leasehold estate should be required to pay the ground rent accruing during the period of redemption of and taxes, and assessments thereon, in order to protect his purchase, and he cannot during such period, apply the rents, issues and profits which the premises are earning for that purpose. But under the well established law, he is obliged to assume such burden if he makes the purchase, and he is presumed to make his bid with a view precisely to such circumstances.⁴⁵

The purchaser at a sale of the mortgaged premises does not take the legal title to the property sold, but has only an equitable title. His interest is said to be an incipient

42—Kronenberger v. Heinemann,
104 Ill. App. 156.

44—Alsop v. Stewart, 194 Ill. 595.

43—Davis v. Dale, 150 Ill. 239.

45—Carroll v. Haigh, 97 Ill. App.
576.

interest that may or may not ripen into a legal title or an absolute estate.⁴⁶

The purchaser of real estate at a master's sale is not entitled to possession until he receives a deed. (*Myers v. Manny*, 63 Ill. 211.) The legal title to the land does not pass by the master's sale. The purchaser acquires a right to a conveyance of the title if the premises be not redeemed. (*Wedgbury v. Cassell*, 164 Ill. 622.) He acquires only a lien. No new title vests until the time of redemption has passed. (*Stevens v. Ill. M. F. Ins. Co.*, 43 Ill. 327; *Rockwell v. Servant*, 63 Ill. 424.)⁴⁷

§ 2149. Insurance Money on Property Destroyed After Foreclosure Sale Belongs to Mortgagor—If after the foreclosure of a mortgage and before the time of redemption expires the improvements are destroyed by fire, the mortgagor is entitled to the insurance money, although the insurance clause in the policy provided that the loss, if any, should be paid to a trustee in a trust deed as his interest might appear; the trust deed being foreclosed, and a sale had thereunder, the trustee had no further interest in the premises; he did not hold any interest in the property for the benefit of the purchaser at the foreclosure sale.⁴⁸

§ 2150. Insurance Premiums Not a Lien on the Mortgaged Property Unless so Specially Provided—Although a mortgage may provide that moneys advanced by the mortgagee for taxes, and assessments and other liens upon the property shall be included in any decree of foreclosure, yet money advanced for the payment of insurance premium cannot be so included unless specially provided for in the mortgage. Insurance premiums are not liens upon the property.⁴⁹

§ 2151. Judgments at Law Not Liens on Surplus Arising on Mortgage Sale—Where judgment creditors have a lien

46—*Bruschke v. Wright*, 166 Ill. 183.

47—*Bartlett v. Amberg*, 92 Ill. App. 377.

48—*Rawson v. Bethesda Baptist Church*, 221 Ill. 216.

49—*Culver v. Brinkerhoff*, 180 Ill. 548.

only on the equity of redemption of a mortgagor in the lands, a sale under the mortgage cuts off the lien of the creditors; a sale to satisfy the mortgage has the effect to convert the land into money upon which the judgments are not liens as to the surplus arising after satisfying the mortgage, and, therefore, the judgments are entitled to no priority of payment; if the judgment creditor desires to retain a priority he should cause a sale of the land under his judgment, subject to the prior mortgage.⁵⁰

§ 2152. Purchaser at Mortgage Sale Holds Under Decree and Not Under the Mortgage—The result of a foreclosure proceeding is to merge the trust deed or mortgage into the decree, and the purchaser at the foreclosure sale holds under the decree, and not under the mortgage or trust deed, and after such sale the purchaser is entitled only to such rights as are conferred upon him by the statute which are: (1) A right to a certificate of purchase; (2) a right to a deed for the premises at the expiration of fifteen months from the date of the sale; and (3) in case of redemption, to receive back the purchase money, with interest, and any taxes he paid upon the property during the period of redemption.⁵¹

§ 2153. Purchaser at Mortgage Sale Succeeds to the Rights of all Parties to the Suit—A purchaser at a sale under a decree of foreclosure takes all the rights of all the parties to the suit, divested of any equity of redemption on the part of all persons who are parties to the suit. By a foreclosure sale and a deed thereunder the legal title becomes vested in the grantee of such deed.⁵²

The general doctrine is that a purchaser at a foreclosure sale will be subrogated to the rights of the holder of the mortgage which has been discharged by the money produced by the sale, in the event that the sale is ineffectual

50—Illinois Nat. Bank v. Trustees of Schools, 211 Ill. 500.

52—Walker v. Warner, 179 Ill. 16.

51—Schaepfi v. Bartholomae, 217 Ill. 105.

to convey title to the property sold. And the same principle applies to the assignee of such purchaser.⁵³

§ 2154. Removal of Improvements After Sale and Before Expiration of Time of Redemption—Where there has been a foreclosure sale of premises upon which there is located a house or other improvements which are unlawfully removed during the period of redemption without the consent of the purchaser at the foreclosure neither the purchaser nor his grantee or assignee can, after acquiring full knowledge of the facts and a delay of a number of years, and after the premises to which the house has been attached has passed into the hands of an innocent holder, maintain a bill to compel the return of the house to its former position, or the recovery of rent after the removal or to establish a lien upon the property to which it was removed for the value of the house and for rent after such removal.⁵⁴

Where the mortgagee has proceeded to a foreclosure and sale, and the mortgagor thereafter remains in possession, and produces a crop, one who purchases such crop in good faith, and before the appointment of a receiver, will be protected in his purchase.⁵⁵

§ 2155. Equitable Estate Vested in Purchaser Not Disturbed for Irregularities—Where a mortgage was foreclosed, and the decree provided that, on default of the payment of the amount found due, the equity of redemption should be barred, and default being made, the property was sold as directed by the decree, but no deed made, the fact, however, being reported to the court, and thereupon a decree entered decreeing the title to the property to be vested in the purchaser, it was held that such an equitable estate vested in the purchaser as to preclude the heirs of the mortgagor from asserting title by bill in equity for a partition of the land.⁵⁶

53—Bruschke v. Wright, 166 Ill. 183.

54—Fisher v. Patterson, 197 Ill. 414.

55—Knox v. Oswald, 21 Ill. App. 105.

56—Barlow v. Stanford, 82 Ill. 298.

Where a decree of a foreclosure of a mortgage directs a sale of the mortgaged premises, without allowing the statutory right of redemption, it is merely erroneous in that respect, and it cannot be questioned collaterally; but if it were void, in so far as it denies the right of redemption, it could not have that effect to deprive the party of that right, and a bill filed by the mortgagor, after the time prescribed by the statute has expired, to redeem from the mortgage sale and have the officer's deed set aside as a cloud upon his title, but shows no offer to redeem from the sale within the time allowed by the statute, is without equity, and may properly be dismissed.⁵⁷

§ 2156. Purchase by Mortgagor at Foreclosure Sale—

Where the mortgagor purchases at a judicial sale, under a mortgage created by himself, he does not thereby acquire a new title, divested of liens prior to the lien under which he purchases. His purchase is nothing more than the payment of the debt, and merely relieves the property from an incumbrance thereon.⁵⁸

§ 2157. Rights of Assignee of Certificate of Sale—Inasmuch as a purchaser at a foreclosure sale has not the legal title to the property bought, he of course assigns no legal title when he assigns the certificate of sale. The assignee of such a certificate is not regarded as being entitled to protection as an innocent purchaser, until he has obtained a legal title to the land by deed. So it has been held that the assignee of a certificate of sale, issued to a purchaser at a sale under a judicial judgment or decree, is chargeable with notice of all irregularities that may intervene in the sale; he can acquire no greater equities under the certificate than the purchaser, who is his assignor, has therein. He takes the certificate charged with all defenses which could be interposed against his assignor. So, whatever equitable defenses could have been interposed against the certificate

⁵⁷—*Suttlerlin v. Connecticut M. L. I. Co.*, 90 Ill. 483.

⁵⁸—*Knickerbocker v. McKinley Coal Co.*, 172 Ill. 535.

in the hands of the original purchaser can be interposed against an assignee from such purchaser.⁵⁹

The complainant and purchaser at a foreclosure sale violates no principle of law by declining to assign the certificate of sale on being tendered the amount due by the grantee of the mortgagor. Although the law will work an equitable assignment on the payment of the amount due, that fact did not render it obligatory on the purchaser to make an assignment of the certificate.⁶⁰

§ 2158. Deed on Judicial Sale Presumed Rightfully Issued—It will not be presumed that an officer wrongfully issues a deed on a judicial sale after the time limited therefor, because the presumption will obtain that there was an order of court authorizing the issuing of the deed. And the fact that a deed was so issued after the time limited therefor will not destroy its effect as a conveyance.⁶¹

§ 2159. Master's Deed Vests Legal Title in Grantee—By a foreclosure of a mortgage and a sale thereunder, and a master's deed to the premises, the legal title becomes vested in the grantee in such deed, and leaves nothing in the mortgagor or his grantee, except perhaps, the right to redeem in equity, where there are equitable grounds for redemption.⁶²

Where the debt and decree are fully satisfied by the sale of the property for the full amount thereof including interest and costs, then as between the purchaser and the owner of the equity of redemption, the jurisdiction of the court ceases when the title to and the possession of the property has been perfected in the purchaser.⁶³

§ 2160. Possession Taken Under Master's Deed Adverse to Rights of Mortgagor and His Grantees—Although the initiation of a defective foreclosure proceeding may oper-

59—*Bruschke v. Wright*, 166 Ill. 183.

60—*Matteson v. Thomas*, 41 Ill. 110.

61—*Harrow v. Grogan*, 219 Ill. 288.

62—*Walker v. Warner*, 179 Ill. 16.

63—*Innis v. Linscheid*, 126 Ill. App. 27.

ate to acknowledge the right of redemption in a person not a party to the suit at the time the suit was instituted, still the culmination of the proceeding and the deed of the master must be recognized as evidence of the assertion on the part of the mortgagee, or the purchaser at the sale, of an extinguishment of the equity of redemption. In such case the taking of possession of the premises is not under the mortgage but is adverse to the rights of the mortgagor and his grantees. Such possession so taken is an assertion of the rights of the purchaser and his grantees, acquired by virtue of the foreclosure sale and the master's deed.⁶⁴

§ 2161. Decrees for Deficiency—Statute—"In all decrees hereafter to be made in suits in equity directing the foreclosure of mortgages, a decree may be rendered for any balance of money that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of such balance, the same as when the decree is solely for the payment of money. And such decree may be rendered conditionally, at the time of decreeing the foreclosure, or it may be rendered after the sale and the ascertainment of the balance due. *Provided* that such execution shall issue only in cases where personal service shall have been had upon the defendant or defendants personally liable for the mortgage debt, unless their appearance shall be entered in such suit."⁶⁵

§ 2162. Deficiency Decree a Statutory Remedy—Originally a mortgagee was relegated to his action at law to obtain a judgment for any deficiency that might be due him after the sale of the mortgaged premises, but section 16 of chapter 95 of the Revised Statutes makes provision by which the mortgagee may, in the same proceeding, obtain a decree *in rem* for the sale of the property, and a decree *in personam* if there should be a deficiency.⁶⁶

A decree for a deficiency may be rendered conditionally at

64—Walker v. Warner, 179 Ill. 16.
65—Sec. 16, Ch. 95, R. S.

66—Bouton v. Cameron, 205 Ill. 50.

the time of decreeing a foreclosure and form part of that decree, or it may be rendered after the sale and the ascertainment of the balance due. It is not necessary that provisions be made in the original decree of foreclosure for a deficiency decree.⁶⁷

While the statute authorizes the decree to be entered conditionally at the time of the decree of foreclosure, its only effect is that a finding that the complainant is entitled to a decree for any balance that may be due after the application of the proceeds of the sale. There can be no personal decree until there is a judicial determination of the amount due. And that amount can only be determined after the sale. The finding that the complainant is entitled to a deficiency decree entered at the time of the entry of the foreclosure decree lacks all the forms of a personal decree for the payment of money, and no action can be brought on it. Unless a decree should be rendered against the defendant in the future, he will be entirely unaffected by the interlocutory finding or conclusion of the court that he will be liable for a deficiency in case it should exist.⁶⁸

§ 2163. Decree for Deficiency Against Third Persons—It is only by the express provisions of the statute, or where the facts give equitable jurisdiction over the demand, that a third person liable for the mortgage debt can be joined as a party defendant in a foreclosure suit, and a judgment rendered against him for the deficiency. In the absence of such statute, and of due circumstances giving jurisdiction to a court of equity, there is a misjoinder of causes of action.⁶⁹

Although a sale under a foreclosure proceeding may extinguish the lien of the mortgage, yet unless the property sells for enough to discharge the amount due and costs, it

67—*Supreme Council W. O. U. v. Drennan*, 193 Ill. App. 532.

69—*Walsh v. VanHorn*, 22 Ill. App. 170.

68—*Eggleston v. Morrison*, 185 Ill. 577.

will not discharge the debt. Under such circumstances, the creditor, if there has been personal service upon the debtor, or the debtor has entered his appearance in the suit, may have a deficiency decree against the debtor for the balance due, upon which an execution may issue as in other cases, or he may bring his action at law and secure a judgment for the balance due.⁷⁰

§ 2164. Strict Foreclosure of Mortgages Arises Where the Decree Does Not Provide for a Sale of the lands but provides that the parties interested may redeem by paying the amount found due within a limited time in default of which payment the title remains absolute in the mortgagee.⁷¹

Where the amount the owner of the equity of redemption is required to pay in order to redeem from a foreclosure sale is less than the value of the property, under our practice, there cannot be a strict foreclosure.⁷²

§ 2165. Time Allowed for Redemption in Strict Foreclosure—In a proceeding to authorize a strict foreclosure, under the English practice six months was usually given the mortgagor to redeem, and if the debt were large the court would extend the time for another six months. And the Supreme Court of Illinois has repeatedly held that in cases of strict foreclosure of mortgages on real estate not less than ninety days should be given, within which the defendant should pay the money found due, and when the sum was large, a longer period.⁷³

§ 2166. Decree Authorizing a Sale Without Redemption Erroneous—By reference to the statute on judgments and executions it will be seen that in all cases of sales of mortgaged lands under a decree in equity, the same right of redemption is given as in cases of sale under an execution at law. This statute was intended to, and does, prohibit the sale of mortgaged lands, under a decree of foreclosure

70—*Strause v. Dutch*, 250 Ill. 326.

72—*Gorham v. Farson*, 119 Ill. 425.

71—*Stephens v. Bicknell*, 27 Ill.

73—*Farrell v. Parlier*, 50 Ill. 274.

without redemption. And a decree which orders a sale of lands without redemption is erroneous.⁷⁴

§ 2167. Rights of Subsequent Purchasers and Incumbrancers—Where there are subsequent purchasers and mortgagees, and no evidence of the value of the premises, it is error to render a decree of strict foreclosure.⁷⁵

§ 2168. Strict Foreclosure of Mortgages Not Favored by the Courts—In view of the policy of our statute providing for the sale of real estate under certain decrees as well as under judgments at law, and allowing the right of redemption therefrom to the debtor, his heirs, assigns or creditors, the object of which is to make the property pay all that it is really worth, strict foreclosures of mortgages is exceptional and not favored.

And where there are other incumbrances, creditors or subsequent purchasers this kind of a decree will not be allowed. And where the value of the mortgaged premises exceed in value the amount of the mortgage debt and costs, it is obvious that to take it for the debt cannot be for the interest of the debtor.⁷⁶

It may be in rare cases when it appears that the property is of less value than the debt for which it is mortgaged, and the mortgagor is insolvent and the mortgagee is willing to take the property in discharge of the debt that a strict foreclosure may be allowed. But it is not as a general rule, proper when there are other incumbrances upon the property, or creditors, or purchasers of the equity of redemption. The statute allowing redemptions in such cases intends to make the property pay as much of the mortgagor debts as it is worth.⁷⁷

Where the title to property is held by one party as security of a debt due him, as a deed absolute in form, it is error

74—Farrell v. Parlier, 50 Ill. 274.

75—Rourke v. Coulton, 4 Ill. App. 257.

76—Brahm v. Deitsch, 15 Ill. App.

831; Miller v. Davis, 5 Ill. App. 474;

Murphy v. Smith, 5 Ill. App. 562.

77—Farrell v. Parlier, 50 Ill. 274; Boyer v. Boyer, 89 Ill. 447.

for the court to decree that unless the mortgagor shall pay the amount of the indebtedness within a limited time, the rights of the mortgagor become forfeited and determined, and the title remain in the mortgagee absolutely. Such a decree amounts in substance to a strict foreclosure. The general rule in this state is, that a strict foreclosure will not be decreed unless it appear that the property is of less value than the debt for which it is mortgaged, and the mortgagor is insolvent and the mortgagee is willing to take the property in discharge of the debt. So, where the main relief sought is the foreclosure of the mortgage, the trial court should order a sale of the property, so as to permit a redemption in accordance with the provisions of the statute.⁷⁸

§ 2169. Rule of Strict Foreclosure in Cases of Scant Security—But it is not understood that the rule in this state is, that a strict foreclosure will in no case, and under no circumstances, be allowed where there are other creditors, or other incumbrances upon the mortgaged property, or purchasers of the equity of redemption. It is undoubtedly true that the general rule is, that a strict foreclosure will not be permitted where there are such creditors, incumbrancers or purchasers, but there are exceptions to this rule. Where it appears that the property affords but scant security for the payment of the debt and it is not reasonably possible that either the complainant or the creditors could reap any benefit if the premises were sold with an equity of redemption, the rule does not apply.

A court of conscience will not sacrifice or endanger the rights of a complainant, who comes within her portals with a just cause, and holding the oldest and preferred lien and best equity, for the bare possibility of a wholly improbable benefit to one having a second lien or subordinate equity.

It is the intent of the law that the property of the mort-

⁷⁸—Carpenter v. Plegge, 192 Ill.

gagor shall pay as much of his indebtedness as it is worth, but the law does not presume that it will pay more than it is worth.⁷⁹

The power of strict foreclosure is frequently exercised by the courts and, indeed, it is probably never refused where the interest of both parties manifestly require it, as is often the case.⁸⁰

§ 2170. Allegations in Bill for Strict Foreclosure of Mortgage—One essential feature to justify a decree of strict foreclosure in this state is that the mortgagee is willing to take the mortgaged property in satisfaction of his whole debt.⁸¹

Where it is alleged in the bill and confessed by default, or proved by evidence, that the mortgaged lands are not equal in value to the debt it is then discretionary with the court to order a strict foreclosure, the effect of which is to vest the title absolutely in the mortgagee. The power to order a strict foreclosure is frequently exercised, and probably never refused when the interest of all the parties require it. We have no statute prohibiting a strict foreclosure.⁸²

Therefore, every bill for a strict foreclosure should aver that its value should not exceed that amount.

Whether it should also aver that notwithstanding it is of less value than the complainant is willing to take it in full satisfaction of the debt is not fully settled in this state.⁸³

§ 2171. Land Taken in Satisfaction of Debt—Under a strict foreclosure if the value of the land be equal to the debt, the debt is considered as satisfied, but it does not operate as an extinguishment of the debt unless it is of equal value.⁸⁴

§ 2172. Form of Decree in Strict Foreclosure of Mortgage—The following has been held to be a good decreetal

79—Illinois Starch Co. v. Ottawa Hydraulic Co., 125 Ill. 237.

80—Johnson v. Donnell, 15 Ill. 97.

81—Griesbaum v. Baum, 18 Ill. App. 614.

82—Stephens v. Bicknell, 27 Ill. 444.

83—Brahm v. Deitsch, 15 Ill. App.

331.

84—Vansant v. Allmon, 23 Ill. 30.

portion of a decree of strict foreclosure: "It is therefore ordered, adjudged and decreed by the court, that the defendants (naming them) pay to the complainant (naming him) the said sum of (naming the amount) with five per cent interest thereon from the date hereof, within ninety days from the date of this decree, and in default in the payment of said sum within the said period of ninety days, they, the said defendants, be forever barred and foreclosed of all right and equity of redemption in and to said premises and every part thereof, and that in default of such payment within the period of ninety days, all the right, title and interest, both legal and equitable, of the said defendants in and to the said premises, and every part thereof, shall be and become vested, absolutely and forever, unconditionally, in the said complainant (naming him). It is further ordered that upon the defendants paying the complainant the said sum (naming it), within the time above mentioned the complainant reconvey the said premises to the said defendants (naming them) by a suitable instrument of conveyance. It is further ordered, adjudged and decreed by the court, that the defendants (naming them) pay the costs of this suit, and that execution may issue therefor."⁸⁵

In a strict foreclosure of a mortgage it is not necessary that the decree should specify in whom the title to the land shall be vested. By barring the equity of redemption it confirms the legal title in the mortgagee.⁸⁶

§ 2173. Supplemental Decree Unnecessary in Strict Foreclosure of Mortgage—In a proceeding for a strict foreclosure of a mortgage it is not necessary in this State, that there should be a supplemental decree finding that the mortgagor had not paid the money required to be paid by him in the final decree, in order to render the title of the complainant complete. The legal title in the premises is vested in the mortgagee by the mortgage and the mortgagor has

85—*Ellis v. Leek*, 127 Ill. 60.

86—*Johnson v. Donnell*, 15 Ill. 97.

only an equity of redemption, and this equity of redemption is foreclosed by the decree, unless he complies with its terms.⁸⁷

§ 2174. Appeal to the Supreme or Appellate Court—Ordinarily a freehold is not involved in a foreclosure proceeding so as to allow an appeal to the Supreme Court direct from the trial court, nor in an ordinary proceeding to have a conveyance absolute upon its face declared to be a mortgage, and a right to redeem therefrom allowed.

Neither is a freehold involved in the ordinary proceeding by an administrator to sell the real estate of the deceased to pay his debts; but where in such a proceeding it is desired to set aside a deed claimed to be fraudulent, a freehold is involved and an appeal goes directly to the Supreme Court.⁸⁸

§ 2175. Court of Review Governed by Record of Trial Court—A court of review can only review the case as the same was made in the trial court, and brought up by the record. Counsel cannot be permitted, by agreement, to present a different case from that which was presented to the trial judge.⁸⁹

§ 2176. Presumptions in Support of Decree of Trial Court—It is a well established principle that in the absence of a complete record, the decree of the trial court will be supported by every reasonable intendment and presumption. If there are errors apparent upon the face of a fragmentary record before the court of review, other portions of the record by which these apparent errors, upon any reasonable hypothesis, may be obviated or cured, will be presumed in support of the decree, that such portions of the record have been omitted. In view of these presumptions, it is, to say the least, doubtful whether any

87—*Ellis v. Leek*, 127 Ill. 60.

89—*Dean v. Ford*, 180 Ill. 309.

88—*Halbert v. Turner*, 233 Ill.

531; *Adamaki v. Wiczorek*, 181 Ill.

361; *Richie v. Cox*, 188 Ill. 276.

question can arise upon such a record which a reviewing court can be called upon to consider.⁹⁰

A variance between the allegations and proofs in a bill of foreclosure cannot be considered upon appeal where the specific objection was not made before the master or the chancellor on the hearing.⁹¹

§ 2177. Court of Review to Reverse Decree Before Modifying It—A court of review cannot modify a decree without first reversing it. After the decree is reversed then the court may modify it by a decree of its own, or by remanding it with instructions. But before it can be modified, the erroneous portions, at least, must be reversed.⁹²

§ 2178. Appeal Allowed from Order Appointing Receiver by Statute—The statutes of this State give the party against whom an injunction has been ordered, or over whose property a receiver has been appointed, the right to appeal from such orders, but from subsequent interlocutory orders, as to the sale and distribution of the property over which a receiver has been appointed, no appeal is given.⁹³

§ 2179. Foreclosure of Mortgages by Scire Facias—Procedure—Statute—“If default be made in the payment of any sum of money secured by a mortgage on lands and tenements, duly executed and recorded, and if the payment be by installments, and the last shall have become due, it shall be lawful for the mortgagee, his assigns, or his or their executors or administrators to sue out a writ of *scire facias* from the clerk’s office of the circuit court of the county in which said mortgaged premises may be situated, or any part thereof, directed to the sheriff or other proper officer of any county or counties where the defendants, or any of them may reside or be found, requiring him to make known to the mortgagor, or, if he be dead, to his heirs, executors or administrators, to show cause, if any

90—Dean v. Ford, 180 Ill. 309.

91—Dorn v. Farr, 179 Ill. 110.

92—Hunter v. Hatch, 45 Ill. 178.

93—Schack v. McKay, 97 Ill. App. 460.

they have, why judgment should not be rendered for such sum of money as may be due, by virtue of said mortgage; and upon the appearance of the party named as defendant in said writ of *scire facias*, the court may proceed to judgment as in other cases, but if said *scire facias* be returned *nihil*, or that the defendant is not found, an alias *scire facias* may issue." 94

§ 2180. **Statute Liberally Construed**—The statute in regard to foreclosing mortgages by *scire facias* is a remedial statute, and as such is entitled to a liberal construction, so that it may accomplish the purpose of the legislative intent. 95

But it was formerly decided that the proceeding to foreclose a mortgage by *scire facias*, being a summary proceeding under the statute, it should in that regard strictly conform thereto. 96

§ 2181. **Statute Changed the Rule in Regard to Foreclosure of Mortgages**—By the laws of 1825, concerning judgments and executions, which has been continued in force up to the present time, it was provided that a mortgage might be foreclosed at law by a *scire facias*, and that the mortgaged premises might be sold by a special *feri facias*, thus, in favor of the mortgagee, permitting a recovery of a judgment at law, against the property, and a sale thereof under execution at law. This changed the rule that a mortgagee must resort to equity to foreclose the equity of redemption, but permitted him, if he chose, to sell it on execution, and thus recognizing the equity of redemption as an interest or title, that might be sold on execution at law, subject to the same incidents that other sales of real estate were under when sold on an execution at law.

The General Assembly thus commenced a modification of the rigors of the common law, and the courts, as far as the power existed, by moulding its plastic rules, and extend-

94—Sec. 17, Ch. 95, R. S.

96—Day v. Cushman, 2 Ill. (1

95—Honore v. Wilshire, 109 Ill. Scam.) 475.

ing its comprehensive principles, to the new and varying circumstances of our advance in civilization, trade, manufacture and commerce, and avoided many of the impediments that stood in the way of progress.⁹⁷

§ 2182. Definition and Nature of Writ of Scire Facias—

A *scire facias* is deemed a judicial writ founded on some matter of record.⁹⁸

Public records to which the writ is applicable are of two kinds, viz.: Judicial and non-judicial. Judicial records are of two kinds, to-wit: judgments in a former suit, and recognizances which are in the nature of judgments.¹

Non-judicial records are such as letters patent, corporate charters and records of conveyances of lands, etc. The writ of *scire facias* when founded on a non-judicial record, is the commencement and foundation of an original action. Under the statute of Illinois, authorizing the foreclosure of mortgages by *scire facias* applies only to mortgages duly executed and recorded.²

§ 2183. Proceeding by Scire Facias a Legal and Not an Equitable Action—As the foreclosure of a mortgage by *scire facias* is a proceeding given and regulated by statute, and is in a court of law, the conclusion is irresistible, that it was the design of the legislature, in the absence of a requirement that it should be in the form of an equitable proceeding, that it should be governed by the practice of courts of law and not of equity. The statute authorizing this mode of foreclosure has given the judgment the effect of a recovery at law as against the mortgaged premises. That it creates no new liability, but is the means of rendering a former lien available.³

Scire facias is purely a proceeding at law, as is debt, or *assumpsit*, and it appertains in no respect to equitable jurisdiction. A recovery in such a case is by judgment

97—Cottingham v. Springer, 88 Ill.

1—Bouv. Law Dic., 499.

90.

2—Kenosha, etc., R. R. Co. v.

98—Chestnut v. Chestnut, 77 Ill.

Sperry, 3 Biss. 309.

346.

3—Chickering v. Failes, 26 Ill. 508.

and not by decree, and such a recovery is enforced by execution on the judgment, directed to the sheriff of the county, and not to the master in chancery, who is, in no sense, or for any purpose, a ministerial officer of a court of law. The statute has authorized the sheriff alone, or in certain cases, the coroner or an elisor, to execute the process of common law courts. The judge of such courts has no power to appoint the master or other person to execute its judgments. The statute must be followed. It then follows that a sale by a master under an execution issued on a judgment in *scire facias* is wholly without power and is void, and a purchaser at such a sale acquires no rights thereunder.⁴

§ 2184. **Parties Plaintiff in Scire Facias**—Strictly speaking the proceeding to foreclose a mortgage by *scire facias* should be commenced in the name of the mortgagee, because the legal title to the land is in him.⁵

But section 17 of chapter 95 of the Revised Statutes of 1874, in relation to mortgages, provides, if default be made in the payment of money secured by mortgage on lands or tenements, duly executed and recorded, on the same becoming due, it "shall be lawful for the mortgagee, his assigns, or his or their executors or administrators" to foreclose the same by *scire facias*. It will be perceived that the statute requires that the mortgage may be foreclosed by *scire facias*, if it be duly "executed and recorded." The statute has made provision that the mortgage may be acknowledged by the mortgagor. No such formality is required by statute as to the assignment of the mortgage to enable the assignee to sue out a *scire facias* in his own name to foreclose it. It is nowhere required that such an assignment shall be acknowledged as deeds or mortgages are required to be acknowledged. Originally the remedy as given by statute to foreclose a mortgage by *scire facias* was confined to the "mortgage, his executors or adminis-

⁴—Tucker v. Conwell, 67 Ill. 552.

⁵—Camp v. Small, 44 Ill. 37.

trators," but the legislature has seen fit to extend the remedy to "assigns" of the mortgagee, and certainly the court ought not to restrict the remedy by requiring the assignment to be made in a particular way, when the legislature has not required it so to be done. The fact that an assignment is not acknowledged, where the statute does not so require it, does not prevent it becoming a part of the record.⁶

§ 2185. Foreclosure of Mortgage by Scire Facias for Use of Assignee of Note—Before the amendment of the statute allowing the assignee of the mortgage to institute proceedings by *scire facias* it was held that the assignment of the note secured by a mortgage did not prevent the foreclosure of the mortgage by *scire facias* in the name of the mortgagee for the use of the assignee of the note, the proceedings being upon the record of the mortgage, and not upon the note.⁷

Doubtless the same principle applies now since the amendment of the statute where the mortgage itself has not been assigned.

§ 2186. Parties Defendant to Scire Facias—The statute giving the remedy to foreclose a mortgage by *scire facias*, and relating to the proceedings thereunder, provides that the writ may issue for that purpose, requiring the sheriff "to make known to the mortgagor, or if he be dead, to his heirs, executors or administrators to show cause, if any they have, why judgment should not be rendered for such sum of money as may be due by virtue of said mortgage."

The language is clear and explicit that the plaintiff may, when the mortgagor is dead, at his election, make either the heirs, executors or administrators defendants, as he may choose. The language is disjunctive and the court cannot by any known rule of construction say that it requires the heirs to be made parties, if the complainant should elect to proceed against the administrator.⁸

6—Honore v. Wilshire, 109 Ill. 103.

8—Rockwell v. Jones, 21 Ill. 279.

7—Bourland v. Kipp, 55 Ill. 376.

In all suits at law the proceedings are confined alone to the parties to the transaction. In no proceeding in that form are incumbrancers or subsequent purchasers ever made parties, but are required to take notice of the proceeding, and failing to do so, their rights are not protected. A plaintiff after recovering a judgment is not required to give notice to persons having subsequently acquired rights before he can proceed to a sale and satisfaction. He may sell, and they, to preserve their rights must redeem within the period limited by the statute.⁹

§ 2187. Writ of Scire Facias Both a Process and Declaration and Amendable—The scire facias is to be regarded both as a declaration and process and there is no good reason seen why it should not be subject to the same rules of amendment as declarations in other cases. The proceeding is not of a criminal character, but one to enforce the recovery of a sum of money accruing due on a contract.¹⁰

The writ takes the place of a declaration, and it should contain, in substance at least, every fact upon which the plaintiff's right of action depends.¹¹

A mortgage, with the endorsement thereon of the registration, is a sufficient record in a proceeding to foreclose the same by *scire facias*, to authorize the court to act. It is the evidence contemplated by the statute when it authorized a mortgagee to sue out a *scire facias*. It is the best evidence and the record could not have been introduced unless upon due proof of the loss of the original mortgage.¹²

§ 2188. Recording Mortgage Essential to Scire Facias—Where the mortgage conveys lands situated in two counties, but is recorded in only one, still a *scire facias* may issue on it out of the county where it is recorded, and the lands situated therein may be ordered to be sold. It is wholly im-

9—Chickering v. Failles, 26 Ill. 508.

10—Peacock v. People, 83 Ill. 831.

11—Osgood v. Stevens, 25 Ill. 89;

Ferris v. People, 58 Ill. 26; Smith v. Stevens, 133 Ill. 183.

12—Alvis v. Morrison, 63 Ill. 181.

material, for the purposes of such proceeding, that the mortgage was not recorded in the other county.¹³

§ 2189. Right to Foreclose by Scire Facias Confined to Money Demands—It is very apparent that the statutory remedy of foreclosure by *scire facias* applies only to mortgages made to secure the payment of money. It does not apply to mortgages made to secure the delivery of specific articles of property, or the performance of any other act. So where the mortgage was made to secure the delivery of internal improvement scrip it was held that the remedy by *scire facias* did not apply.¹⁴

§ 2190. Proceeding by Scire Facias Not an Ordinary Action but a Proceeding to Enforce a Specific Lien—The prohibition in the statute against the issuing an execution against a judgment debtor prior to one year after the issuing of letters of administration has no application to a proceeding to foreclose a mortgage by *scire facias*. Such a proceeding is not an action in the ordinary acceptance of the term, and a mortgage creditor has a specific lien on the premises described in the mortgage which is not affected by the solvency or insolvency of the estate of the deceased.¹⁵

§ 2191. Maturity of Debt Essential to Scire Facias—A mortgagee may not proceed by *scire facias* to foreclose his mortgage until all payments become due, and the mortgagor is in default.

While it may be true that a writ of *scire facias* issued before the debt is due would clearly be ground for abating the suit, or it could be made available for the reversal of the judgment on appeal, it cannot be held that it rendered the judgment a nullity. A judgment so rendered can not be questioned collaterally.¹⁶

§ 2192. Foreclosing by Scire Facias a Proceeding in Rem—The statute prescribes a mode of foreclosing a mortgage

13—Woodbury v. Manlove, 14 Ill. 213.

15—Menard v. Marks, 1 Scam. 25.

16—Rockwell v. Jones, 21 Ill. 279.

14—McCumber v. Gilman, 13 Ill. 543.

in courts of law, and the judgment must have the effect of a judgment at law, against the mortgaged premises alone. The judgment rendered in such a proceeding is *in rem*, and can affect nothing but the property described in the mortgage. It creates no new lien upon the mortgage premises, but is merely the means of making available the lien which was created by the execution and recording of the mortgage.¹⁷

The object of the proceeding is to enforce a specific lien, and not to obtain a judgment *in personam*. The judgment only determines the amount due on the mortgage, and directs the sale of the mortgaged premises to satisfy the same and costs. It creates no lien on the other property of the mortgagor, and the only process that can issue is a special execution against the mortgaged premises.¹⁸

§ 2193. Notice to Defendant by Publication and Mail—Statute—"If the defendant is a non-resident, or has gone out of the State, or on due inquiry cannot be found, or is concealed within the State, or evades service of process, the plaintiff or his attorney may file an affidavit in the same form as in like cases in chancery, and notice may be given as in such cases."¹⁹

§ 2194. Form of Writ of Scire Facias—The following form has passed the inspection of the Supreme Court. State of Illinois, Schuyler County, ss.

The People of the State of Illinois, to the sheriff of said county, Greeting:

Whereas David Manlove and Moses Manlove, by A. B. and C. D., their attorneys, have filed in the clerk's office of our Circuit Court, within and for the County of Schuyler, aforesaid, a certain deed of mortgage, in words and figures following, that is to say, (Here follows a copy of the mort-

17—State Bank v. Wilson, 9 Ill. (4 Gilm.) 57.

19—Sec. 18, Ch. 95, R. S.

18—Woodbury v. Manlove, 14 Ill. 213.

gage, acknowledgment and record). And whereas it appears that the last installment in the condition of said mortgage deed mentioned has long since become due and payable by the said Greenleaf M. Woodbury to the said David and Moses Manlove, according to the terms of said condition. And Whereas, by virtue of the deed of mortgage, aforesaid, the condition therein contained, and according to the tenor and effect of the promissory notes or obligation in said condition recited, it appears that the said Greenleaf M. Woodbury is indebted upon the said mortgage deed to the said David and Moses Manlove in the sum of one thousand six hundred and ten dollars, together with interest thereon, at the rate of six per cent. from the time when said notes and obligations became due and payable, according to the tenor and effect thereof, and the said Greenleaf M. Woodbury has failed to pay the same, or any part thereof, unto the said David and Moses Manlove, according to the tenor and effect of said mortgage deed, and the notes and obligations therein recited, although often requested so to do.

And Whereas, the said David and Moses Manlove by A. B. and C. D., their attorneys, have filed in our clerks' office their *præcipe*, directing that a writ of *scire facias* be issued on the said mortgage deed, against the said Greenleaf M. Woodbury, and directed to the sheriff of the county of Schuyler aforesaid, and returnable to the next term of our said circuit court.

We, therefore, command you that you serve the said Greenleaf M. Woodbury, if to be found in your county, personally to be and appear in and before our circuit court, within and for said county of Schuyler, on the first day of the next term thereof, to be holden at the court house in Rushville, the seat of justice of said county, on theMonday of the month of next, and then and there show cause, if any he have, why judgment should not be rendered against him, in favor of the said David and Moses Manlove, upon the mortgage

deed aforesaid, for the said sum of one thousand six hundred and ten dollars, together with interest as aforesaid, which appears to be due and owing from him to them, by virtue of the mortgage, as aforesaid, and condition therein contained. And have you then and there this writ, and the manner in which you shall have executed the same.

In Witness Whereof A. B., clerk of our said circuit court, hath hereunto subscribed his name, and affixed the seal of the said circuit court, at, this..... day of, A. D.

(Seal) Clerk.²⁰

The following is the form of *scire facias*, adopted in a certain cause, which, with the corrections which are suggested to it, may be useful in the preparation of a writ of this kind.

State of Illinois, }
County of Peoria. } ss.

To the sheriff of Peoria County, in the State of Illinois, Greeting:

Whereas on the 14th day of August, A. D. 1854, Bartholomew Fortier filed in the office of the clerk of the Circuit Court of said county a præcipe, in substance as follows, to-wit:

| | | |
|----------------------|---|----------------------------|
| Bartholomew Fortier, | } | In Peoria Circuit Court. |
| vs. | | To Sept. Term, A. D. 1854. |
| James McFadden. | | |

The clerk of said court will please issue a writ of *scire facias* to foreclose a mortgage herewith filled in the above entitled cause, returnable to said term.

(Signed) Manning & Merriman,
Attorneys for Plaintiff.

And Whereas, on the same day there was filed in the said office a mortgage in substance as follows, to-wit: (Here followed a copy of the mortgage).

Upon which mortgage is a certificate of Jacob Gale, clerk

20—Woodbury v. Manlove, 14 Ill.

of the circuit court, within and for the county of Peoria, an officer authorized by law to take acknowledgments of deeds, of the acknowledgment of the execution of said mortgage, by James McFadden, which certificate is substantially as follows, to-wit: (Here follows a copy of the certificate of acknowledgment).

Which said mortgage was duly executed and recorded in Recorder's Office of Peoria County, and the whole of the moneys secured to be paid by the same, has become due and payable.

And the said plaintiff avers that the said promissory notes in said mortgage referred to, are in substance as follows, to-wit: (Here followed copies of the notes).

And for that whereas the said plaintiff avers that the said defendant, though often requested so to do, hath not paid the said sums of money mentioned in said notes referred to in said mortgage, and secured to be paid by said mortgage, with interest according to the tenor and effect thereof, or the accruing interest thereon, to the said plaintiff, nor have any person paid the same or any part thereof to the said plaintiff, for the said defendant, but the said sum of five thousand dollars, being the amount of said notes secured by said mortgage, with interest thereon from maturity of said notes, still remains due and unpaid.

You are therefore commanded to summon the said James McFadden, if he be found in your county, to be and appear before the Circuit Court of Peoria County, on the first day of the next term thereof, to be holden in Peoria, in and for said county, on the second Monday of September next, to show cause, if any he has, why judgment should not be rendered for such sum of money as may be found due by virtue of such mortgage, and a special writ of *feri facias* requiring the property mortgaged to be sold to satisfy such judgment.

Witness James Gale, Clerk of said (Court) and the seal thereof at Peoria, this 14th day of August, A. D. 1854.

(Seal)

James Gale, Clerk.

§ 2195. Defense Pleaded—Set Off—Statute—"The defendant may plead or set off any defense, and be allowed to set off a demand in his favor, in the same manner, and the same rules shall apply thereto, as if the suit were in any other form of action."²¹

Formerly it was held that a mortgagor in a *scire facias* proceeding to foreclose his mortgage, could only show matters in satisfaction or discharge of the debt, such as payment, release or other matters which satisfied and discharged the debt. He could not show that the mortgage was a voluntary instrument or was without consideration.²²

He was not allowed to prove a set off.²³

But this has all been changed by the modern statutes.

§ 2196. Defects in Writ Open to Demurrer—The writ is considered both a process and a declaration, and defects therein can be reached by demurrer. The defendants in this proceeding filed a general demurrer, which the court overruled and the defendant thereupon filed three pleas. In commenting on this writ the Supreme Court says the defects in the writ are apparent. It does not run in the name of "The People of the State of Illinois" as the constitution declares that all writs and processes shall run. The writ is void on its face, and the objection to it can be raised on general demurrer, though it would be more proper to reach the defect by a motion to quash.

It will also be noticed that there is an absence of the usual clause to a writ in regard to its return. The court further says that the demurrer to the *scire facias* should have been sustained, but as the defendant withdrew his demurrer and pleaded over, he cannot assign this as error, for by pleading (to the merits) the demurrer is waived. It has been held, however, that the omission of these words is a mis-

21—Sec. 20, Ch. 95, R. S.

23—Woodbury v. Manlove, 14 Ill.

22—Fitzgerald v. Forristal, 48 Ill. 213.

228.

prision of the clerk, and is amenable after a motion to dismiss is made on account of the omission.²⁴

§ 2197. Presumption as to the Delivery of the Writ to Officer—Where there is nothing in the record to indicate when a writ of *scire facias* was delivered to the sheriff, it is the legal presumption that it was delivered to him at its date.²⁵

§ 2198. Requisites of Service of Writ—The sheriff is to make known to the mortgagor the object of the proceeding, by reading to him the *scire facias*, the usual mode by which the summons and other process are served. The return should show the time and mode of the service, and on whom it was made. It is this service which gives the court jurisdiction over the person of the defendant, and without it, or his voluntary appearance, to the action, the proceedings of the court are irregular and erroneous.²⁶

Without that formality they are not properly before the court, and where these are wanting all proceedings as to them are void.²⁷

Where the sheriff returns a writ of *scire facias* that he has made known to the defendant by honest and lawful men—naming them—as he is therein commanded, such service will be held good and sufficient. While by the modern practice it is usual to return the writ that the defendant had been served by reading the writ to him, and this, no doubt, is the better practice, still a return in strict conformity with the English practice will be sufficient to authorize the court to proceed to judgment.²⁸

§ 2199. Two Returns of Writs Nihil Sufficient to Give Court Jurisdiction—In the foreclosure of a mortgage by *scire facias* there is an express provision that a return of two *nihils* shall be sufficient to authorize the judgment, and

24—McFadden v. Fortier, 20 Ill. 509.

25—Chickering v. Failes, 26 Ill. 508.

26—Ballingall v. Gear, 4 Ill. 575.

27—Chickering v. Failes, 26 Ill.

508.

28—Rockwell v. Jones, 21 Ill. 279.

there is good reason for such distinction. It is a proceeding *in rem* against the land alone, and the party against whom the judgment is rendered incurs no personal responsibility. It is assimilated to the doctrine of the common law, which did not permit the issuing of a *scire facias* in any but real actions, where the proceedings were against the thing, and not against the person merely.²⁹

It is not usual, if it has ever been done, for an officer to certify that he has not been able, during the whole time the writ is in his hands, to find the defendant. And there is no implication that the defendant could only not be found on the day of the return of the writ.³⁰

§ 2200. Judgment to be Given—Statute—“If the defendant appear and plead or set up any defense, or make default after having been served with *scire facias*, or notified as aforesaid, the court may proceed to give judgment, with costs, for such sum as may be due by said mortgage, or appear to be due by the pleadings, or after default, if any be made.”³¹

The judgment in a *scire facias* only determines the amount due on the mortgage, and directs the sale of the mortgaged premises to satisfy it.³²

§ 2201. Voidable Judgments—Although there may be an error in the judgment rendered in a proceeding to foreclose a mortgage by *scire facias*, by reason of its not directing the sale of the mortgaged premises as required by the statute, and for such error it might be reversed on appeal, yet the defendant in such judgment, not having availed himself of his privilege of appealing, he cannot attack the judgment collaterally, nor can a stranger to such proceedings do so.³³

29—*McCourie v. Davis*, 7 Ill. (2 Gilm.) 298; *Chickering v. Failes*, 26 Ill. 508; *Williams v. Ives*, 49 Ill. 512.

30—*Chickering v. Failes*, 26 Ill. 508.

31—Sec. 19, Ch. 95, R. S.

32—*Carpenter v. Mooers*, 26 Ill. 162.

33—*Swiggert v. Harber*, 5 Ill. (4 Scam.) 364; *McCormick v. Bauer*, 122 Ill. 573.

A judgment in a *scire facias* proceeding, which fails to award a special execution for the sale of the mortgaged premises, is manifestly wrong, and would be reversed on appeal.

And an execution issued on such a judgment might on motion be quashed and a levy and sale thereunder set aside.

But it does not necessarily follow that such proceedings are void, and may be inquired into in a collateral proceeding. Where the court has jurisdiction of the subject matter and of the parties, whether the judgment is correct or incorrect is, until reversed, binding on the court, and every other court, and the parties.³⁴

§ 2202. Judgment Against Administrator in Scire Facias—The law authorizes a proceeding to foreclose a mortgage by *scire facias* against the administrator of the mortgagor; and after a *scire facias* has been issued out against the mortgagor and served upon him, and his death suggested upon the record, the court may legally acquire jurisdiction over the administrator of the mortgagor by a revival of the suit against him. In respect to thus foreclosing a mortgage the court is legally authorized to render such judgment against him, as administrator, as might have been rendered against the mortgagor if living. And a judgment so rendered, and the proceedings under it, are to be considered precisely as they would be, if in the lifetime of the mortgagor, judgment had been rendered against him.³⁵

§ 2203. Attorney's Fees Allowed in Foreclosure by Scire Facias—Where a mortgage given to secure the payment of certain promissory notes provides in express terms that in case of default in the payment the mortgagor shall pay all costs of collection and also all attorney's fees, a reasonable amount can be recovered as attorney's fees merely in a foreclosure by *scire facias* although such amount does not

34—Rockwell v. Jones, 21 Ill. 278.

35—Swiggart v. Harber, 5 Ill. (4 Scam.) 364.

rest in computation, but must be ascertained by evidence *aliunde*, and the objection that no attorney's fees were due at the commencement of the suit will not be sustained.³⁶

§ 2204. **Special Execution—Lien—Statute**—"The mortgaged premises may be sold to satisfy any judgment the plaintiff in such action may recover, and the court may award a special writ of *feri facias* for that purpose, to the county or counties in which the mortgaged premises may be situated, and on which the like proceedings may be had as in other cases of execution levied upon real estate: Provided, however, that the judgment aforesaid shall create no lien on any other lands or tenements than the mortgaged premises, nor shall any other real estate or personal property of the mortgagor be liable to satisfy the same; but nothing herein contained shall be so construed as to effect any collateral security given by the mortgagor for the payment of the same sum of money, or any part thereof, secured by the mortgage deed."³⁷

§ 2205. **Satisfaction of Mortgage by Scire Facias a Complete Satisfaction**—The mortgage is as completely satisfied by the foreclosure under the statute in regard to *scire facias* as it would be by a foreclosure in chancery. They are concurrent remedies, and the mortgagee may elect which he will pursue. But after he has pursued one remedy, till he has obtained satisfaction of his debt, by a sale of the premises, he cannot pursue the other remedy. He is concluded by the former proceeding.³⁸

§ 2206. **Rights of Purchaser at Foreclosure Sale on Scire Facias**—A purchaser on a sale under a judgment in *scire facias* acquires all the right in the mortgaged premises which the mortgagor had at the time of the execution of the mortgage, entirely unaffected by the title of purchasers or incumbrancers subsequent to the record of the mortgage,

36—Clawson v. Munson, 55 Ill. 394.

37—Sec. 21, Ch. 95, R. S.

38—State Bank v. Wilson, 9 Ill. (4 Gilm.) 57.

or with notice, who in order to save themselves, must redeem as in cases of ordinary sales on executions at law.³⁹

The purchaser after the expiration of the time of redemption, if the premises be not redeemed, becomes the absolute owner thereof, and is entitled to all his rights as such.⁴⁰

§ 2207. **Powers of Courts of Chancery Over Judgments in Scire Facias**—Where the writ of *scire facias* and the judgment thereon is against a tract of land, a part of which had been released from the effect of the mortgage, it would operate harshly, if not fraudulently, to permit the judgment to stand and a sale thereunder to be operative, and thus cut off the claims of all subsequent purchasers not parties to the suit. The effect of it would be to deprive them of title to that part of the premises which had been released. To sanction such a proceeding would be to sustain the most palpable injustice and wrong, and a court of chancery has power to set aside such a judgment and the sale thereunder, and it is its duty to do so.⁴¹

§ 2208. **Writ of Assistance Defined**—A writ of assistance is defined as “a special writ issued by a court of equity in aid of the execution of its decree.” (Standard Dictionary.) A good idea of it can be formed by an examination of the writ shown post—Sec. 2215.

§ 2209. **Writ of Assistance Issued Only on Judicial Inquiry**—There should be a hearing by the court upon the facts presented to it so that the court may judge of the propriety of awarding the writ; it should not be left to the determination of the clerk.⁴²

Although the decree of foreclosure may provide that on the default of any person in possession of the premises sold to deliver possession thereof to the purchaser on his produc-

39—Chickering v. Failes, 26 Ill. 508; State Bank v. Wilson, 9 Ill. (4 Gilm.) 57.

40—Stoddard v. Walker, 90 Ill. App. 422.

41—Tucker v. Conwell, 67 Ill. 552.

42—Bruce v. Roney, 18 Ill. 67; Smith v. Brittenham, 3 Ill. App. 62.

tion of a conveyance therefor, a writ of assistance may issue in accordance with the practice of the court, yet before a writ can issue, there must be a judicial investigation, ascertaining the facts justifying such writ.⁴³

But where in a foreclosure proceeding a receiver has been appointed to receive and collect the rents, upon due notice to the defendant, and he is in possession and refuses either to surrender possession or pay rent, a writ of possession may lawfully be ordered issued.⁴⁴

Where land is sold under a decree of foreclosure a writ of assistance will issue to put the holder of the master's deed in possession of the premises. In such case he obtains his title from the decree of the court, and a court of chancery will put a party in possession of the premises, when it has, by its own decree, given the title to the premises to such party.⁴⁵

§ 2210. Against Whom Writ Will Issue—A writ of possession can only issue against a defendant in the bill, and those claiming under him, after the suit has been commenced; it will not be awarded against one who is not a party.⁴⁶

§ 2212. Writ of Assistance Not Issued When Unjust and Inequitable—Where after a sale and deed to the complainant in a foreclosure suit the complainant and the defendant come to an agreement and understanding in regard to the possession of the premises, and the complainant agrees with the defendant to convey to him on the payment of the amount due, the defendant having acquired a new right to the premises, it is erroneous to issue a writ of assistance to turn him out of possession until his right to a specific performance can be determined.

Where new facts have arisen after the entry of the de-

43—Cook v. Moulton, 68 Ill. App. 480; Higgins v. Peterson, 64 Ill. App. 256.

44—Dorr v. Root, 104 Ill. App. 417.

45—Clay v. Hammond, 199 Ill. 370.

46—Paine v. Root, 121 Ill. 77; Gale v. Carter, 154 Ill. App. 478.

cree, which will render it unjust and inequitable to execute the decree fully, it will not be enforced in such regard.⁴⁷

While a court of equity has the undoubted jurisdiction to award a writ of possession in the execution of its decree, it will not ordinarily do so where there is any reasonable prospect that the party in possession may make a successful defense of his possession, either at law or by the aid of a court of equity.⁴⁸

§ 2213. Writ of Assistance Not Proper in Bills to Remove Clouds—Where land is sold under a decree foreclosing a mortgage a writ of assistance will be issued to put the purchaser at the mortgage sale in possession of the premises. In such a case the purchaser obtains his title from the decree of a court of chancery. But where the title is already vested in a party, and he comes into court for the purpose of securing the removal of a fraudulent deed as a cloud upon his title, after the court has removed such cloud it will leave the party to pursue his remedy at law, in order to get possession of the premises. The awarding of a writ of assistance to put such party in possession is not warranted by law.⁴⁹

§ 2214. Form of Decree Providing for Writ of Assistance—“And it is further ordered, adjudged and decreed that upon the execution and delivery of the conveyance or conveyances as aforesaid, that the said purchaser or purchasers, his or their representatives or assigns, be let into possession of the portion of said mortgaged premises so conveyed to him or them, and that any of the parties to this cause who may be in possession of said premises, or any part thereof, on the production of the master’s deed of conveyance and a certified copy of the order of this court confirming the report of said sale, shall surrender possession thereof to such purchaser or purchasers, their representatives or assigns, and on refusal so to do will be considered in contempt of this court.”⁵⁰

47—Cochran v. Folger, 116 Ill. 194.

48—Flowers v. Brown, 21 Ill. 270.

49—Clay v. Hammond, 199 Ill. 370.

50—Cochran v. Folger, 116 Ill. 194.

§ 2215. Form of Writ of Assistance.

State of Illinois, }
 County of } ss.

The People of the State of Illinois, to the Sheriff of said County, GREETING:

WHEREAS, in the case of

 in the Court of County, in and for the State of Illinois, a decree was entered on the day of A. D., providing for the sale of the premises hereinafter described;

AND WHEREAS, in pursuance of said decree a sale of the premises was thereafter made to one
, and in pursuance of said sale a Master's Deed was thereafter duly made and delivered to the said
, purchaser at said sale;

AND WHEREAS,
 parties defendant to said suit, or persons who have come into possession of said premises, or some portion thereof, pending said suit, and under or through the parties thereto, were in possession of the said premises, or some portion thereof, at the date of the said Master's Deed, and the said last named persons have failed, neglected and refused to surrender possession of said premises to the grantee in said Master's Deed, as required by the terms of the decree of sale;

AND WHEREAS, by an order of said Court made and entered on the day of A. D., it was directed that a writ of assistance should issue in said cause to eject and remove from the possession of said premises the said and put into the possession of the said premises the said

....., the grantee in the said Master's Deed.

NOW, THEREFORE, we command you that in pursuance of the said orders and proceedings of the said Court of County, you do at once proceed to eject and remove from the possession of the said premises the said and that you put the said

..... grantee in the said Master's Deed, into full and complete possession of the said premises and real estate, which are situated in the said County of and State of Illinois, and are known and described as follows, to-wit:

.....

and that you certify to said Court in what manner you shall have executed the said writ within ninety days from this date.

Witness,, Clerk of our said Court, and the Seal thereof, at Chicago, in said County and State, this day of
, A. D. 1910.

.....,
 Clerk of Court of County, Illinois.

§ 2216. Right of Mortgagee to Take Possession of the Mortgaged Premises Peaceably—If the mortgagee can do so peacefully, he may enter upon and take possession of the mortgaged premises, and apply the rents and profits to the payment of the mortgage debt and interest thereon. When the mortgagee enters and takes possession after condition broken and before the debt is paid, for the purpose of enforcing his security, the relation of mortgagee and mortgagor continues to exist and the mortgagee occupies a position of trust with reference to the mortgagor.⁵¹

51—Walker v. Warner. 179 Ill. 16.

§ 2217. Rights of Mortgagee in Possession—Where the legal holder of the mortgage notes, whether he be the original mortgagee or his assignee, after condition broken, enters into possession of the mortgaged premises, he will occupy the same position as the original mortgagee in possession, and become liable for the rents and profits actually received or which by diligence might have been received, to be credited upon the indebtedness from year to year, first for the extinguishment of the interest, and then to the extinguishment of the principal.

And he, being in peaceable possession of the mortgaged premises, after default in the payment of the note, cannot be dispossessed by the grantee of the mortgagor until the mortgage debt is paid or otherwise legally extinguished. If ejectment be brought by one claiming under the mortgagor of the premises against the mortgagee in possession, or one holding under him as tenant, the mortgage will constitute a complete defense to the action, for the reason that ejectment cannot be maintained against one lawfully in possession.⁵³

§ 2218. Improvements and Repairs Made by Mortgagee in Possession—It is stated as a general proposition that a mortgagee in possession has no right to make improvements and repairs on the mortgaged premises and charge the costs of them to the mortgagor.⁵⁴

But in case the mortgagee in possession should make such improvements, the court may make or deny allowances therefor according to the equities of the circumstances. But it has also been said that it is not only the right but it is the duty of the mortgagee in possession to put upon the premises all necessary and proper repairs to prevent them from going to waste, and to reimburse himself out of the rents and profits, unless, under the condition of the premises it would be injudicious to make such repairs.

52—*Fountain v. Bookstaver*, 141 Ill. 461.

54—*Halbert v. Turner*, 233 Ill. 531.

Circumstances might exist where it would be better for the estate to abandon the improvements altogether than to repair them. In such case the court would not sanction an expenditure thus injudiciously made. The propriety of the improvements must be determined with reference to the condition of the owner of the equity of redemption, for it is upon his estate that the improvements are made, and it is against him that the expense is sought to be charged. It is a very hard, if not an unjust rule, which in any case makes one a debtor against his will, and it is very clear that it never should be done, unless it is manifestly to his advantage as well as just and proper as to the other party. Where the condition of the owner of the equity of redemption is such that it would be a great injustice to impose upon him such a burden, then it should not be done. It might be equivalent to denying him any relief whatever.

While the mortgagee in possession might be justified in making the necessary repairs, the rule does not admit of his making new improvements at the expense of the estate; although sometimes circumstances may exist which would authorize the court, in stating an account between the parties, to allow the mortgagee for new improvements, which he in strictness is not authorized to make at the expense of the mortgagor. Where the mortgagee in possession, believing that he has made a valid purchase of the premises, and makes the improvements in good faith, he may perhaps be properly allowed therefor, provided it will not cast too great a hardship upon the mortgagor.⁵⁵

§ 2219. Ejectment by Mortgagee on Condition Broken—

While the mortgagor may be regarded as the legal owner of the premises as against all strangers, yet he is not such owner as against the mortgagee.⁵⁶

At common law a mortgage conveyed the fee in the land to the mortgagee, and under it, the mortgagee could oust

⁵⁵—McCumber v. Gilman, 15 Ill. 381.

⁵⁶—Walker v. Warner, 179 Ill. 16.

the mortgagor immediately upon the execution of the mortgage without waiting for the period fixed for the performance of the condition. In other words, the mortgagee might, at common law, maintain ejectment against the mortgagor before condition broken and turn him out of possession, unless the right of the mortgagee was restrained by the terms of the mortgage. To prevent ejectment being brought by the mortgagee against the mortgagor most English mortgages contained a clause that, until default made, the mortgagor, his heirs and assigns might hold and enjoy the land and receive the profits without interruption by the mortgagee and his heirs. It must be remembered, however, that the equitable theory of a mortgage has, in process of time, made in this State material encroachments upon this legal theory. The doctrine is still maintained, that the mortgagee can still bring ejectment against the mortgagor, but the tendency of the latter decisions has been to hold that this right has been so far limited, as to confine the bringing of the action to cases where the condition of the mortgage has been broken, or where there has been failure to make payment of principal or interest according to the terms of the mortgage. The more reasonable rule is, that the title exists for the benefit of the holder of the mortgage indebtedness. The rule that the mortgagee can only bring ejectment against the mortgagor after condition broken seems to be sustained by the following authorities in this State.⁵⁷

§ 2220. Stating Account Between Mortgagee and Mortgagor—In stating an account between the mortgagee in possession and the owner of the equity of redemption, the mortgagee should be credited with the expense of judicious repairs made by him in good faith; and such payments he may have made to relieve the premises from a former incumbrance; all taxes paid by him thereon; and insurance

57—Kransz v. Udelhofer, 193 Ill. 109; Oldham v. Pflager, 84 Ill. 102; 477. Citing: Vansant v. Allmon, 23 Ill. 433; Lightcap v. Bradley, 186 Ill. 570.

premium paid by him if any; and interest on these sums; he should be charged with the reasonable rent of the premises; the value of the rent to be estimated with reference to the repairs for which he has received credit; the rents to be applied first to extinguish the taxes paid, repairs and other expenses; should any balance remain then towards the interest due upon the mortgage, and then upon the principal; annual rests being made in the computation. If the amount paid for taxes, repairs and other expenses exceed the value of the rents, interest may be allowed on the excess.⁵⁸

It is the duty of the creditor to diligently guard and protect the effects in his hands for the security of his debt. So, where the mortgage was on a leasehold estate of the mortgagor, the application of the rents by the mortgagee in possession to the discharge of the ground rent and the taxes on the property is a proper and lawful application of the rents and profits of the estate by the mortgagee to protect the security held by him.⁵⁹

§ 2221. Suit at Law Upon the Mortgaged Securities—It cannot be seriously doubted that the mortgagee or his assignee is entitled to pursue several remedies afforded by the law for the satisfaction of the indebtedness, and that the right to resort to an action at law against the makers of the notes is in no way qualified or limited by agreements or transactions between the mortgagor and his grantee, such as the grantee shall assume and pay the indebtedness secured by the mortgage, unless the mortgagee or his assigns in some way assent to such agreement or transactions. Suits at law against the makers of promissory notes, or taking judgment against them by confession, is a proper remedy for the collection of the notes, and such a remedy may be pursued concurrently with a proceeding to foreclose the mortgage given to secure such notes. A court of

58—McCumber v. Gilham, 15 Ill. 381.

59—Ellis v. Conrad Seipp Brewing Co., 207 Ill. 291.

equity will not enjoin an action at law on the notes merely because the grantees of the mortgagors had assumed and agreed to pay the debt.⁶⁰

Although a promissory note may be secured by a trust deed or mortgage, still it is the legal right of an innocent holder thereof who acquires title thereto before the maturity thereof to have a judgment at law on the note, for the amount of the note without regard to the equities existing between the maker and the payee. And this is the rule at law without regard to the mortgage or trust deed.⁶¹

It has been held that where a person becomes the purchaser of real estate by deed, and in the deed conveying the property it is stipulated and agreed that the purchaser assumes and agrees to pay a mortgage on the property as a part of the consideration of the conveyance to him, the contract creates a personal liability on the purchaser in favor of the holder of the mortgage, which may be enforced in an appropriate action.⁶²

§ 2222. Mortgage of the Lands of Infants and Other Incompetents—The statutes of Illinois provide for the mortgaging and sale of the lands of infants and other incompetents; these subjects are fully treated and considered in the chapter on "Guardians Dealing with Ward's Lands," and "Incompetents—Lunatics, Idiots, Drunkards and Spendthrifts," to which reference is here made.

60—*Hazle v. Bondy*, 173 Ill. 302.

62—*Thompson v. Dearborn*, 107 Ill.

61—*Zollman v. Jackson T. & S.* 87.

Bank, 238 Ill. 290.

CHAPTER XX

RECEIVERS

RECEIVERS—RENTS ISSUES AND PROFITS OF REAL PROPERTY

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§ 2348. Failure of Party to Pay Money on Order of Court Not Contempt Unless Wilful.

§ 2349. Liability of Receiver for Contempt of Court.

§ 2330. Introduction—The subject of receivers is one that properly relates to the general chancery practice, and as such embraces a very extended field. There are a number of very excellent works on the general subject, and the importance of the subject itself is worthy of exhaustive treatment. There are, however, many of the principles relating to it which are applicable to the foreclosure of mortgages, to rents and profits and the care and protection of mortgaged property, and other real estate; and without attempting to exhaust the general subject, still, it may properly be considered here, in so far as it relates to real estate and subjects germane thereto. The importance of these subjects warrant giving it a separate chapter.

§ 2231. Nature of Office of Receiver—A receiver is the right hand and creature of a court of equity, and has such powers as are conferred upon him by order of the court appointing him, and the course and practice of the courts.¹

He holds the property in his possession as an officer of the court appointing him.²

And the property entrusted to his care is *in custodia legis* for the benefit of him who may finally establish his title thereto.³

A receiver is not the representative of the party whose property he holds; he is the officer and representative of the court which appointed him.⁴

But as to the property, and all the rights to property of a judgment debtor, and as to all lawful transactions with

1—Christie v. Burns, 83 Ill. App. 514.

2—Bartlett v. Cicero L. H. & P. Co., 177 Ill. 68.

2 R. P.—58

3—Ruprect v. Henrici, 113 Ill. App. 398.

4—Chicago C. Ry. Co. v. People, 116 Ill. App. 633.

his property, the receiver stands in the place of the judgment debtor.⁵

A receiver is an officer of the court appointing him and acts under its orders and directions and can do no act legally beyond that; nor can its officers or agents of a court of equity do any act without its authority, so that it will be compelled to make decisions and render decrees which it would not otherwise do. It is not within the policy of the law to allow receivers, who have been authorized to borrow money by the order of the court, by fraudulent actions, to usurp the functions of the court.⁶

Receivers and like officers are, in a general sense, trustees in respect to the particular persons toward whom they stand in a fiduciary relation.⁷

§ 2232. Power of Court to Appoint Receiver an Extraordinary Power and is one of the most important prerogatives of a court of equity, and, ordinarily, is to be exercised only where it is clear that there is no other remedy of doing justice between the parties and to prevent the accomplishment of a wrong.⁸

The power of a court of chancery to appoint a receiver in a proper case is undoubted, but the exercise of that power is an entirely different proposition.⁹

It is no slight thing for a court of chancery to lay its hands on the property and take it out of the control of the claimant. It should only be done when the court can see by the specific allegation, sustained by credible evidence, that will justify such action.¹⁰

A receiver should be appointed in no case unless it is made to appear that there is an imperative necessity for the

5—First Nat. Bank v. Baker, 62 Ill. App. 154.

6—Newbold v. Peoria & S. R. R. Co., 5 Ill. App. 367.

7—Wilson v. Equitable Trust Co., 98 Ill. App. 81.

8—Schack v. McKey, 100 Ill. App. 294.

9—Daley v. Nelson, 119 Ill. App. 627.

10—Young v. Rutan, 69 Ill. 513.

step, to preserve some particular property for such persons as shall be entitled to the benefit thereof.¹¹

A receiver should never be appointed unless it is apparent from the showing made that there is danger of the property being dissipated, or placed beyond the jurisdiction of the court, or in some way involved by transfer or conveyance, or its being subject to other claims, so as to render it more difficult for the court to give and enforce the final relief to which the complainant may be entitled.

The appointment of a receiver and authorizing him to take possession of the property of another is the exercise of a higher and more far-reaching power than the granting an injunction, and should not be resorted to where an injunction will as well serve the purpose of the judicial proceeding, and at the same time protect the rights of the complainant.¹²

If the applicant for the appointment of a receiver withdraws his application the court would be without authority to further entertain the application.¹³

Where it is made to appear to the court that the matters in controversy in the original bill are settled between the parties, so that the bill can no longer be maintained, the power of the court to appoint a receiver is lost.¹⁴

§ 2233. Equitable Powers Exercised by Courts of Law—Statute—"When it shall appear that any garnishee has in his hands, or under his control any goods, chattels or choses in action or effects belonging to or which he is bound to deliver to the defendant, with or without condition, the court or justice of the peace may make any and all proper orders in regard to the delivery thereof to the proper officer, and the sale and disposition of the same, and the discharge of any lien thereon, and may authorize the garnishee to sell any such property, or collect any chose in action, and ac-

11—First Nat. Bank v. Gage, 79 Ill. 207.

12—Schack v. McKey, 97 Ill. App. 460.

13—Chicago T. & T. Co. v. Chapman, 132 Ill. App. 55.

14—Christoffel v. Lee, 153 Ill. App. 395.

count for the proceeds thereof; or, if the proceedings be in a court of record, the court may appoint a receiver to take possession and sell, collect or otherwise dispose of the same, and make all necessary orders in regard thereto which may be necessary or equitable between the parties." ¹⁵

§ 2234. Purpose of Appointing a Receiver—The only purpose for appointing a receiver is to preserve the security or property, and apply the proceeds thereof—either the rents, issues, profits or other proceeds when necessary, to the discharge of the indebtedness, or for the benefit of the persons interested therein to whom they rightfully belong. ¹⁶

So where there is no fraud alleged, or shown, and no sufficient proof that such a step was necessary to save the property from material injury or rescue from impending destruction, there is no necessity for the appointment of a receiver. A receiver should be appointed in no case, unless it is made to appear that there is an imperative necessity for the step to preserve some particular property for such parties as shall be entitled to the benefit thereof. ¹⁷

When a court seizes the funds of a bank it does so for the benefit of the creditors of the bank. The court by its receiver takes possession of the property and does so to be administered, paid and distributed according to the equitable claims of the creditors of the bank. By appointing a receiver and placing the funds in his hands, none, the slightest, change occurs in the rights of a single creditor, as a depositor. It becomes the duty of the court to distribute the fund, according to the rights of the creditors as they then existed. The mere fact that a fund was deposited in the bank by the order of the court does not give the claim of

¹⁵—Sec. 24, Ch. 62, "Garnishment," R. S.

¹⁷—Merrifield v. Burrows, 153 Ill. App. 523.

¹⁶—Davis v. Dale, 150 Ill. 239;
Knickerbocker v. McKinley Coal
Co., 172 Ill. 535.

the court a preference over other just claims, where the deposit is not made a special deposit.¹⁸

§ 2235. Receivers Not Appointed as a Punishment for Past Offenses—Courts do not appoint receivers as a punishment for past dereliction, nor because of past dangers. Receivers are appointed because of present conditions and well founded apprehensions of the future. Past conduct and past conditions may be taken into consideration in determining what the present situation is and what the future will be, but a receiver will not be appointed because of things done or attempted at a past time, when the present situation and the prospects for the future are not such as to warrant the taking the control of the property out of the hands of the owner.¹⁹

§ 2236. Appointment of Receiver a Matter of Discretion—The appointment of a receiver is a matter of discretion with the court, and not a matter of right; the discretion is to be exercised with regard to the circumstances of the case; it is to be exercised with great caution and never except in a strong case. The general rule is to refuse interlocutory application for the appointment of a receiver, unless the complainant presents a *prima facie* case, and the court is satisfied that the danger of ultimate loss to the complainant.²⁰

Extreme caution should be observed by the courts in the appointment of receivers to take the property of solvent and going concerns.²¹

It must appear that its exercise is for the promotion of the ends of justice, and for the protection of the rights of all the parties interested in the controversy, and the subject matter, and is based upon facts made to appear to the

18—Otis v. Gross, 96 Ill. 612.

19—Vienna Bakery Co. v. Heissler, 50 Ill. App. 406.

20—Ruprecht v. Henrici, 113 Ill. App. 398; Gee v. Gee, 107 Ill. App. 313.

21—Vienna Bakery Co. v. Heissler, 50 Ill. App. 406; Black Diamond Co. v. Waterloo, 62 Ill. App. 206.

court that there is no other adequate remedy or means of accomplishing the desired object of the judicial proceeding.²²

Although a trust deed may authorize the trustee to take possession of the mortgaged premises, yet if he refuses to do so, a court of equity may appoint a receiver independent of any question of the depreciation of the property. An appointment may also be made in such a case though it may not appear whether the party personally liable is solvent or insolvent.²³

While the appointment of a receiver is a matter of discretion with the court, yet, where the mortgage provides for such an appointment on default in the payment of the indebtedness, the fact that the real estate is ample security for the debt is immaterial and the appointment of a receiver in such case is not a violation of the discretion of the court.²⁴

It is not always discretionary with the court either to appoint a receiver or to order the funds in his hands as proceeds of the rents applied on the deficit after the sale. It may be a matter of right of all the parties interested.²⁵

§ 2237. Exhausting Remedy at Law Before the Appointment of a Receiver—The power of appointing a receiver is seldom exercised where there are other legal remedies which are adequate to protect the rights of the moving parties.²⁶

In creditor's bills and proceedings of such nature, receivers are not ordinarily appointed till it is shown that the creditor has exhausted his remedy at law, for the reason, among other things, that to do so would deprive a party against whom the proceedings are prosecuted, of his right

22—Schack v. McKay, 97 Ill. App. 460.

23—Gooden v. Vinke, 87 Ill. App. 562.

24—Lechner v. Green, 104 Ill. App. 442.

25—Townsend v. Wilson, 155 Ill. App. 303.

26—Watson v. Cudney, 144 Ill. App. 624.

of trial by jury. As a general rule, the creditors of a corporation must enforce their legal claims at law, and they can obtain relief in equity only after their legal remedies have been exhausted.²⁷

The power to appoint a receiver and put him in possession of the property of another is one of the most important prerogatives of a court of equity and is only to be exercised by a conscientious chancellor when it is clear there is no other adequate means of doing justice between the parties, and preventing the accomplishment of a wrong. It does not necessarily follow that because the remedy at law is attended with difficulty, that the complainant may have relief in equity by the appointment of a receiver.

Where the material allegations of the bill make out the statement of a case for which the law affords a full remedy then the complainant has a full, plain, adequate and complete remedy at law. And where the application is for the appointment of a receiver and directing him to take possession of property, out of the possession of one who claims to hold it by right of ownership before a final hearing, and it appearing the complainant has such an adequate remedy at law there is no necessity for the appointment of a receiver, and one should not be appointed.

The reservation of the defendant in his answer of all advantage he might have by demurring to the bill, enables him, on the hearing of the application for the appointment of a receiver, to raise the question that the complainant has a complete and adequate remedy at law.²⁸

§ 2238. Courts Without Jurisdiction to Grant Relief Without Power to Appoint a Receiver—Where the bill as presented is insufficient to authorize any relief under it, the appointment of a receiver is improper. It is clear that if the court is without jurisdiction to grant the ultimate relief

27—*Brabrook Tailoring Co. v. Belding*, 40 Ill. App. 326.

28—*Schack v. McKay*, 97 Ill. App. 460.

prayed for in the bill, it has no power to appoint a receiver.²⁹

And when the jurisdiction is wanting, either as to the subject matter of the parties, the judgment is a nullity.

So it was held that a decree appointing a receiver of the property of the defendant who had not been properly served with process was a nullity, and his acts in selling the property were not legal.³⁰

§ 2239. Appointing Receivers Being Discretionary, not Reviewable—The act of appointing a receiver being discretionary with the court its acts in that regard will not be reviewed where no abuse of such discretion appears.³¹

Where the appointment of a receiver is not the ultimate end or object of the suit, but merely ancillary thereto, and resting in the sound discretion of the court, the Appellate Court will not interfere with the course being pursued by the trial court, except where it appears that the justice of the case requires it.³²

On an application to the chancellor for the appointment of a receiver he does not abuse his discretion in hearing proofs by affidavits, where equal rights in that respect are accorded to each of the contestants, and all the proofs offered by either of them are received and heard by the court.³³

§ 2240. Power of Appointing Receiver Under Legislative Control—The power to appoint a receiver is the prerogative of a court of equity, but that power is subordinate to the legislative action whenever a statute exists in any wise limiting or defining the power.³⁴

§ 2241. Necessity of Appointment of Receiver Apparent—The general rule, no doubt, is subject to few excep-

29—Hooper v. Davis, 70 Ill. App. 682; People v. Weigley, 155 Ill. 491.

30—St. Louis & Sandoval C. & M. Co. v. Sandoval C. & M. Co., 111 Ill. 32.

31—Garrett v. Simpson, 115 Ill. App. 62.

32—St. Louis, V. & T. H. R. R. Co. v. Vandalia, 103 Ill. App. 363; Love v. Love, 145 Ill. App. 150.

33—Chicago T. & T. Co. v. Chapman, 132 Ill. App. 55.

34—Watson v. Cudney, 144 Ill. App. 624.

tions, that a receiver should never be appointed unless it appear to the chancellor from the showing made that there is danger that the property which is the subject of litigation is liable to be dissipated or placed beyond the jurisdiction of the court, or in some way involved in transfers or conveyances, or by its being subjected to other claims so as to render it difficult for the court to give and enforce final relief of the kind to which the complainant is entitled. So where it appears from the allegations of the bill that the defendant had no right, title or interest of the real estate, and that the conveyance was made to him for the purpose of violating an injunction and for the purpose of hindering and delaying the complainant in the enforcements of his rights, is sufficient ground for the appointment of a receiver.³⁵

Where the allegations of a bill show that the trustees of a corporation, under the pretense of a sale, have fraudulently taken the assets and property of the corporation and have converted them to their own use, and that the property may be traced by a receiver, but if none be appointed the defendants will make way with such property, and put it beyond the reach of the court, and that the corporation had ceased to do business, these allegations are sufficient to justify the appointment of a receiver.³⁶

A receiver is not usually appointed until after an answer is filed, but in cases of fraud or some other strong ground is shown to induce the court to act, and the facts are shown by affidavit, the court may be justified in appointing a receiver before an answer is filed.³⁷

A mortgagee, filing a bill to foreclose a mortgage, will not be entitled to have a receiver appointed unless it appears to the court that the mortgagor is insolvent and the security is inadequate.³⁸

35—Hancock v. American Bonding & T. Co., 86 Ill. App. 630; Schack v. McKay, 97 Ill. App. 460.

36—Chandler Mortgage Co. v. Leming, 113 Ill. App. 423.

37—Daley v. Nelson, 119 Ill. App. 627.

38—Cross v. Will County Nat. Bank, 177 Ill. 33.

§ 2242. Power of Courts of Equity to Appoint Receivers for Corporations—Statute—“Courts of equity shall have full power, on good cause shown, to dissolve and close up the business of any corporation, to appoint a receiver therefor who shall have authority, by the name of the receiver of such corporation (giving the name) to sue in all courts and do all things necessary to close up its affairs as commanded by the decree of the court. Such receiver shall be, in all cases, a resident of the State of Illinois, and shall be required to enter into bonds, payable to the People of the State of Illinois, for the use of the parties interested, in such penalty and with such securities as the court may, in the decree or order, appointing the same, require. In all cases of suits for or against such receiver, or the corporation of which he may be receiver, writs may issue in favor of such receiver or corporation, or against him or it, from the county where the cause of action accrued to the sheriffs of any county in this state for service.”³⁹

It is clear from the authorities that in this State courts of equity will not readily appoint a receiver of a corporation where the case made therefor is not under section 25 of the Corporation Act. But it was not intended by these authorities, however, to hold that courts of equity have been deprived by that act of the authority to appoint receivers for solvent corporations when the facts are such that the appointment is within the ordinary powers of a court of equity but for said section 25; in other words, said section 25 is not to be construed to mean that the ordinary jurisdiction to appoint a receiver has thereby been withdrawn. The appointment of a receiver is a remedy of purely equitable origin, having originated in the English Court of Chancery, where it has been employed from a very early time. It is, indeed, one of the oldest equitable remedies, and grows out of the inherent powers of a court of equity to accord relief where the remedies to be obtained in the courts

39—Sec. 25, Ch. 32, R. S. .

of ordinary jurisdiction are inadequate. From its origin in English chancery, where all the leading principles in relation to its exercise were well established before the American Revolution, the power to create a receivership has naturally and regularly descended to, and become one of the inherent powers of all courts exercising equitable jurisdiction. The power to appoint a receiver *pendente lite*, with power merely, to care for and preserve the property committed to his charge, is one incidental to the jurisdiction of a court of equity. It does not and never did depend upon a statute, nor upon the character of the parties, whether individuals or corporations, nor upon the nature of the property. A court of equity will grant relief to a shareholder which the nature of his case may require. But it has always been a settled principle, that no interference with the management of a corporation can be justified, unless such interference be absolutely necessary to the attainment of justice. The appointment of a receiver or manager of a solvent corporation must therefore be considered a strong remedy which can be justified by a strong case; as where disputes have arisen between the managing agents of the corporation, which cause a stoppage of its business and threatens to entail great loss upon the shareholders. Cases may arise where the removal of the directors of a corporation would be essential to the company's welfare. Under such circumstances a remedy must be found. Hence, if the removal of the directors is absolutely necessary to the protection of the corporation, and the corporation has no means of removing them or of revoking their powers, individual stockholders may apply to the court on behalf of the company, and the court will grant such redress as justice requires. It is to be observed, however, that the court will not remove the directors from office, or restrain them generally from representing the corporation, except in a case of absolute necessity.

If, from the facts disclosed by the pleadings it is evident that there is no person authorized to take charge and con-

duct the affairs of the corporation, and the majority of the stockholders neglect to elect directors to take charge of the property of the corporation, the minority are not to suffer in consequence of such neglect. Under such circumstances it is proper to appoint a receiver to take charge of the affairs of the company, and preserve them for the benefit of the stockholders generally. In such a case the court will interfere, but only for a limited time and to as small an extent as possible.⁴⁰

It is within the power of a court of equity to appoint a receiver of a corporation where the board of directors of the corporation have been guilty of mismanagement of the affairs of the corporation, and guilty of malfeasance in office.⁴¹

And if the appointment be made in a suit in which a corporation is a party, the appointment does not dissolve the corporation. It still remains in existence and is clothed with its franchise. The appointment of a receiver for the corporation merely gives him the temporary management of the affairs of the corporation under the direction of the court, instead of leaving it under the direction of the management appointed by the directors of the corporation. The receiver is legally the agent of the corporation although under the direction of the court.⁴²

Receivers over corporate bodies proceed with great caution.⁴³

§ 2243. Conditions Authorizing the Appointment of Receivers—The question frequently arises whether the facts and circumstances of a particular case authorizes the court to appoint a receiver. These are so infinite that it is impossible to classify them. The determination of this ques-

40—Merrifield v. Burrows, 153 Ill. App. 523; Heitkamp v. American P. & C. Co., 158 Ill. App. 587; Vienna Bakery Co. v. Heissler, 50 Ill. App. 406.

41—Great Western T. Co. v. Gray, 122 Ill. 630.

42—Bartlett v. Cicero, L. H. & P. Co., 177 Ill. 66.

43—Brabrook Tailoring Co. v. Belding, 40 Ill. App. 326.

tion must rest largely in the good judgment of the solicitor having the matter in charge. The few following citations may, however, be of aid in the matter.

Where the directors of a corporation have abandoned it, its assets and stockholders to whatever fate awaits them to the administration of the secretary, who has been guilty of gross breach of trust, a receiver should be appointed to administer the assets for the benefit of the creditors and stockholders.⁴⁴

A bill may be filed by a simple contract creditor under section 25 of chapter 32, Revised Statutes, to dissolve a corporation and appoint a receiver to wind up its affairs. And the mere fact that his debt is not due is no objection to his doing so. Proceedings under that section are for the benefit of all the creditors of the corporation *pro rata*.⁴⁵

A court of equity ought not to take jurisdiction of a controversy relating to the internal management of a foreign corporation and appoint a receiver therefor at the suit of a stockholder, when no question of public concern is involved.⁴⁶

§ 2244. Receiver Ordinarily a Disinterested and Indifferent Person—Ordinarily the receiver is a person who is indifferent as between the parties to the case, and who is to hold the possession of the property or funds in litigation *pendente lite* when it does not seem reasonable to the court that either party should hold it. He is not the owner of the property so in his possession.⁴⁷

While it is true that a trustee will not generally be appointed receiver for an estate held in trust, yet if it appear that the appointment would be for the best interest for the trust estate the rule may be departed from.⁴⁸

44—Midland Co. v. Trasher, 63 Ill. App. 51.

45—Northam & Co. v. Atherton, 67 Ill. App. 230.

46—Bradbury v. Waukegan & W. M. Co., 113 Ill. App. 600.

47—Wiswell v. Kunz, 173 Ill. 110; Watson v. Cudney, 144 Ill. App. 624.

48—Patterson v. Northern Trust Co., 230 Ill. 334.

And the mere fact that a party is a party to the proceedings does not, necessarily, disqualify him from acting as receiver. And if, after the commencement of the suit, he has parted with all his interest in the subject matter of the litigation, the objection to his appointment as receiver is removed.⁴⁹

And if it appears that his interest is not inimicable to the interest of the other parties to the suit, his appointment will not be regarded as erroneous.⁵⁰

There are numerous authorities to the effect that a party to the litigation should not be appointed a receiver therein. But where it appears that the only relation that the person had the subject matter of the litigation was that he had, by the voluntary act of all the interested parties, been appointed agent to have charge and manage the property involved, by reason of which he was made a party to the suit, it was held that he was not an unfit person to be appointed receiver. And the court was led to believe that the appointment of the particular person as receiver was not so opposed to principle as to warrant the reversing the order appointing him.⁵¹

Even though there were a rule which absolutely disqualified an ordinary creditor from acting as receiver under the direction of the court, the rule cannot be extended so as to disqualify one who has been so appointed receiver, and require his removal upon his becoming a creditor of the defendant by reason of advancing his own money for the protection of the estate.⁵²

The selection and appointment of a receiver is a matter peculiarly within the discretion of the court, having viewed the special circumstances of the case and the fitness of the candidate for the position by reason of his occupation, ex-

49—*People v. Illinois B. & L. Assn.*,
56 Ill. App. 642.

50—*Kehm v. Mott*, 86 Ill. App. 549.

51—*Iroquois Furnace Co. v. Kim-
bark*, 85 Ill. App. 399.

52—*Roby v. Title G. & T. Co.*, 166
Ill. 336.

perience and character; and in case of the appointment of an objectionable person as receiver, convincing circumstances amounting to an overwhelming objection in point of propriety, of choice, or something fatal in principle, must be shown to procure a removal of an appellant tribunal. The fact that there are greater disputes and differences between the parties in interest, one of whom has been appointed receiver, does not of itself constitute sufficient ground for reversing the appointment made by the trial court.⁵³

§ 2245. Corporations May be Appointed Receivers—Statute—"Whenever application shall be made to any court in this State for the appointment of any receiver * * * it shall be lawful for any such court to appoint any such corporation (organized to execute trusts) as such * * * receiver."⁵⁴

"Such corporation shall not be required to give any bond or security in case of any appointment hereinbefore provided for, except as hereinafter provided, but shall be responsible for all investments which shall be made by it of the funds which may be entrusted to it for investment by the court and shall be further liable as natural persons in like positions now are, and as hereinafter provided. The amount of money which any such corporation shall have on deposit at any time shall not exceed ten times the amount of its paid-up capital and surplus, and its outstanding loans shall not at any time exceed said amount."⁵⁵

"Provided, however, that when it shall appear to the Auditor of Public Accounts from the annual report of any such company that the value of the personal property and cash held and possessed by such company by virtue of the provisions of this act, and any amendment thereof, exceeds

53—*People v. Illinois B. & L. Assn.*, 56 Ill. App. 642; *Iroquois Furnace Co. v. Kimbark*, 85 Ill. App. 399.

54—Sec. 2, Laws 1887, 144; Hurd's Stat., Sec. 130, Ch. 32.

55—Sec. 3, Laws 1887, p. 144; Hurd's Stat., Sec. 131, Ch. 32.

ten times the amount of the deposits aforesaid (therein before provided to be made by the corporation with the Auditor of Public Accounts), he shall require said companies, if in cities or towns of 100,000 inhabitants or more, forthwith to increase said deposit to the sum of \$500,000, in such securities, and in all cities and towns of less than 100,000 inhabitants, to forthwith increase its said deposits to the sum of \$125,000 in such securities.⁵⁶

§ 2246. Persons Ineligible to Appointment as Receivers—

As a general rule the appointment of a receiver is a matter of discretion with the court; but there are persons who, owing to their position, are not usually competent to act as such; a party to the suit is not competent, unless by the consent of both of the parties; nor is a trustee, for he is the person to see that the receiver does his duty; the two characters are incompatible; but, in a special case he might be appointed, he engaging to act without compensation; nor will a man be appointed receiver whose position may cause difficulty in the administration of justice. A master in chancery is disqualified, he being the officer whose duty it may be to pass on the accounts of the receiver and check his conduct; and a solicitor for the complainant should not be appointed receiver.⁵⁷

A receiver is defined to be an indifferent person between the parties, appointed by the court, and on behalf of all the parties and not of the complainant or of any defendant only, to receive the thing or property in litigation, pending the suit.

Where, therefore, the receiver appointed was the secretary and treasurer, and the largest single creditor of the corporation, whose property was placed in his hands as receiver, and was also the legal adviser of the complainant and framed the bill of complaint, as well as the legal adviser

⁵⁶—Laws of 1899, p. 123; Hurd's Stat., Sec. 134, Ch. 32.

⁵⁷—Benneson v. Bill, 62 Ill. 408.

of the defendant company, it was held that he was disqualified, and he should not have been appointed.⁵⁸

§ 2247. Officers of Courts Ineligible to Appointment as Receivers—Statute—"That neither the clerk nor the bailiff nor any deputy clerk or deputy bailiff of said Municipal Court * * * shall be appointed receiver or guardian *ad litem* in any suit therein pending."⁵⁹

§ 2248. Objections to Appointment of Receiver—Objections to the appointment of a receiver which are personal to him should be made at the time of the appointment, and the question as to the propriety of his appointment cannot be raised after the lapse of years thereafter; so, where it appears that a trustee who held the title for the benefit of certain beneficiaries was appointed receiver and no conflict of interest arose therefrom, his appointment as receiver cannot be urged as erroneous after he has acted as such for three years.⁶⁰

§ 2249. Simple Judgment Creditor Not Entitled to Receiver, Except Under Section 25 of the Corporation Act—So a simple judgment creditor, after a sale of the land of the judgment debtor on his execution which fails to pay the full amount of the judgment is not entitled to have a receiver appointed to collect the rents and profits of the land during the period of redemption for his benefit and apply the same on the unpaid portion of the judgment.⁶¹

§ 2250. Wrongful Appointment of a Receiver—A receiver cannot properly be appointed merely upon an unverified petition for that purpose, as it is not a pleading but a mere motion in writing. The defendant is not required to answer it nor can a default thereon be taken.⁶²

A receiver wrongfully appointed must account to the party lawfully entitled to the possession of the premises for

58—*Baker v. Backus*, 32 Ill. 79.

61—*Pringle v. James*, 109 Ill. App.

59—Sec. 281, Ch. 37, "Courts," 100.

R. S.

62—*Ruprecht v. Henrici*, 113 Ill.

60—*Patterson v. Northern Trust* App. 398.

Co., 230 Ill. 334.

the rents and profits collected by him. So where it appeared that a junior mortgagee was lawfully in possession of the mortgaged premises and entitled to the rents, issues and profits thereof during the period of redemption, and while so in possession a receiver was wrongfully appointed upon the application of a third party, and the receiver obtains possession and collects the rents upon an order being entered vacating his appointment, there is no reason why the possession of the premises should not be returned to the junior mortgagee, and the rents collected by the receiver turned over to him, less a reasonable compensation to the receiver for his services.⁶³

Where a receivership is procured under the assertion of an unjust and wrongful claim, as finally found by the court, and the receiver is authorized to take possession of the property of another on such wrongful assertion, the court can protect the injured party by returning the property of which he was divested without its being diminished by receiver's charge.⁶⁴

§ 2251. Notice of Application for Appointment of Receiver—Courts should proceed with great caution in the appointment of receivers without notice to the parties to be affected. It is the settled practice to require notice by the moving party to be given to the adverse party of an application for a receiver to be appointed over his property except in cases of the gravest emergency, such as the absconding of the debtor, or irreparable injury; and the rule of practice requiring notice to be given would seem to be not a matter of discretion with the court, but an inflexible rule which the courts are not at liberty to disregard. To warrant the court in entertaining an application for the appointment of a receiver without notice, it must clearly be shown that the delay which would result from giving notice would defeat the rights of the plaintiff or would re-

63—*Euprecht v. Muhlke*, 225 Ill. 188.

64—*Hughes v. Link Belt M. Co.*, 95 Ill. App. 323.

sult in great injury to him. Only in cases of the gravest emergency demanding the interposition of the court to prevent irreparable injury, or in cases where the defendant has wilfully put himself beyond the jurisdiction of the court, should such an order be made *ex parte*. And when relief is sought on an *ex parte* application upon the grounds of extreme necessity, even though under oath, the particular facts and circumstances rendering such summary proceedings necessary should be set forth in the application; a mere statement of opinion as to such necessity will not justify a departure from the established rule requiring notice of the application.⁶⁵

A party in default for the want of an appearance is not entitled to notice of an application for the appointment of a receiver.⁶⁶

A defendant is entitled to notice of the application for the appointment of a receiver, though he be in default, where a receiver is merely incidental to the main object of the bill.⁶⁷

Ordinarily notice of an application for the appointment of a receiver should be given to the parties interested in the subject matter of the litigation; but where it is conclusively shown by the record that a party had suffered no prejudice for the want of notice, as where upon a full hearing, participated in by the party objecting to the appointment, the court denies a motion to vacate the order appointing the receiver. The want of notice in the first instance is immaterial.⁶⁸

If the appointment of a receiver is justified by the facts, he will not be discharged on the motion of the defendant,

65—Craver & Steele Co. v. Whitman & Barnes Co., 62 Ill. App. 313; English v. People, 90 Ill. App. 54; Consolidated S. M. & M. Co. v. Loeber, 96 Ill. App. 128; Rich v. Maloney, 121 Ill. App. 502.

66—Armstrong v. Douglas Park Building Assn., 60 Ill. App. 318.

67—Rice Co. v. McJohn, 244 Ill. 264.

68—Iroquois Furnace Co. v. Kimbark, 85 Ill. App. 399.

although no notice of the application for his appointment was given.⁶⁹

Where it appears that the complainant was unable to find the defendant and his counsel refuses to disclose his whereabouts, these facts warrant the court in dispensing with the service of notice upon him, of such application.⁷⁰

Where the record does not show that the receiver was appointed without notice the presumption is, in the absence of such showing, that the court proceeded regularly upon sufficient notice.⁷¹

§ 2252. Appointment of Receiver Not Subject to Collateral Attack—Where the court has jurisdiction of the subject matter and of the parties in a proceeding in which a receiver is appointed, its action in appointing the receiver cannot be attacked collaterally.⁷²

§ 2253. Receiver Concluded by Order of Appointment—Where a receiver is appointed, after a decision of a suit against the defendant, for whom he is appointed, he is concluded by the judgment the same as is the insolvent whom he represents, and he cannot relitigate the issues involved in such suit.⁷³

§ 2254. Party Dealing with Receiver Estopped from Denying His Appointment—Where a person deals with another as a receiver he is estopped from questioning the fact of the appointment and qualification of the party as receiver.⁷⁴

§ 2255. Interlocutory Appointment of Receiver—It frequently happens that to do complete justice between the parties a receiver should be appointed at an early stage in

69—Hancock v. American B. & T. Co., 86 Ill. App. 630.

70—Hooper v. Davies, 70 Ill. App. 682; Lindgren-Mahan C. F. E. Co. v. Revere Rubber Co., 70 Ill. App. 379.

71—Kehm v. Mott, 86 Ill. App. 549.

72—Rand v. Mutual Fire Ins. Co.,

58 Ill. App. 528; Great Western Tel. Co. v. Gray, 122 Ill. 630; Vandalia v. St. Louis, V. & T. H. R. R. Co., 209 Ill. 73; Holmes v. Knapp E. Works, 59 Ill. App. 58.

73—Hopkins v. Taylor, 87 Ill. 436.

74—Hanke v. Blattner, 34 Ill. App. 394.

the proceedings. There are many cases where the appointment of a receiver is necessary to prevent fraud and injustice and the loss of security. As where the premises mortgaged are a meager and scant security for the debt, and the debtor is insolvent, and allows the premises to be sold for taxes. In a suit to foreclose a mortgage or trust deed the beneficiaries thereunder acquire an equitable interest in the rents of the premises mortgaged, and the right which the mortgagor had to collect the rents passes to the receiver as soon as he is appointed and qualifies. The undoubted weight of authority is found to be in favor of the proposition that the court may, even when the mortgage does not in express words give a lien upon the income from the property, appoint a receiver to take charge of it and collect the rents, issues and profits therefrom.

The appointment of a receiver at an early stage of the proceedings will not be had, however, unless it be made to appear that the mortgaged premises are insufficient security for the debt, and the person who is personally liable for the debt is insolvent, or at least of questionable solvency. A combination of these two things seems to be required in this state and in one or more of the other states it is held to be necessary that other elements should conjoin to those mentioned before such proceedings will be justified.⁷⁵

The following citations are illustrative of the principles above stated.

Where the debtor suffers the mortgaged premises to be sold for taxes, he thereby suffers a lien to be created superior to the mortgage which, if not redeemed, will eventually destroy the lien of the mortgage. The mortgagee is not compelled to make such redemption but may protect himself through a foreclosure proceeding in which a receiver may be appointed. This doctrine is recognized in the case of *Haas v. Chicago Buil. Society*, 89 Ill. 498.⁷⁶

75—*Haas v. Chicago Building Society*, 89 Ill. 498; *Stephens v. Reibling*, 45 Ill. App. 40.

76—*Ortengen v. Rice*, 104 Ill. App. 428.

Where it appears that the premises are a scant security for the debt, that the mortgagor is out of the jurisdiction of the court, that the principal and interest has been due for a long time, that the buildings are not kept insured nor the taxes paid, it is not error to appoint a receiver, though made at a time earlier than that provided in the mortgage.⁷⁷

A court may appoint a receiver prior to the service of process upon the defendant in the creditor's bill. Such appointment, however, is dependent upon the defendant's being at some time brought into the suit by appearance or service of process.

When he is brought in he should move for the discharge of the receiver, if he desires to complain of it.⁷⁸

The court is not obliged to wait until the claimant of the property has gone through the proceeding of demurring, or pleading to or answering the bill of complaint. To so hold would make the appointing of receivers *pendente lite impossible*, for the answer or the plea would require a waiting for a final determination.⁷⁹

If all the court does was in effect to determine by the order appointing a receiver that in the then state of the *res*—an unfinished apartment building—it was imperative in order to preserve it as a valuable property for those whom the court should thereafter determine who might be entitled to it or an interest in it, it surely then cannot be seriously contended that the chancellor would have been justified, on being moved by either party, in refusing to appoint a receiver. But for the appointment of a receiver the question of what is to become of the property during that which threatens to be a protracted litigation is of vital importance. Interest accruing on the mortgage indebtedness, the accruing of mechanic's lien claims, taxes piling up, the building going to decay for the want of completion,

77—Gale v. Carter, 154 Ill. App. 478.

78—Russell v. Chicago T. & S. Bank Co., 40 Ill. App. 385.

79—Bailton v. People, 83 Ill. App. 396.

and no income from the property, if it is allowed to remain in its present condition. Surely such a case calls for the protecting care of a receiver.⁸⁰

Where a trust deed, in the nature of a mortgage, authorizes the trustee to take possession of the mortgaged premises upon default being made in the covenants of the deed to be kept by the mortgagor, and upon such default the trustee refuses to act, the court may appoint a receiver independently of the question of the depreciation of the property. And an appointment may also be made in such case even though it does not appear whether the party personally liable is insolvent or not.⁸¹

The general rule is, subject to few exceptions, that a receiver should never be appointed unless it appears to the chancellor from the showing made that there is danger that the property which is the subject of litigation is liable to be dissipated or placed beyond the jurisdiction of the court, or in some way involved by the transfer or conveyance, or by its being subjected to other claims so as to render it more difficult for the court to give and enforce the final relief to which the complainant may be found to be entitled. But the lack of allegations in the bill that the defendant was insolvent or a non-resident, or that service of notice or process could not be made, are not always reasons sufficient for the reversal of a decree appointing a receiver of land in controversy.⁸²

Where in the order appointing a receiver *pendente lite* there is a finding that the defendant is the owner of the equity of redemption, that the bill has been taken as confesses as against him, that all the other defendants have entered their appearance in the case and consented to the appointment of a receiver, that the rent, issues and profits are by the terms of the mortgage conveyed as a part of the

80—Chicago T. & T. Co. v. Chapman, 132 Ill. App. 55.

82—Hancock v. American B. & T. Co., 86 Ill. App. 630.

81—Gooden v. Vinke, 87 Ill. App.

security that the defendant is in possession of the premises and collecting the rents and profits, and the complainant will suffer loss and damage unless a receiver is appointed, such finding of facts will justify the order appointing a receiver.⁸³

To justify the appointment of a receiver under the 25th section of the Corporation Act, something more is necessary than a mere allegation that it has "ceased to do business." It must be shown that such cessation has been for such a time that the court may infer more than a mere temporary suspension, or facts must be set forth from which it appears that the suspension is more than an interruption of its usual course by reason of some emergency.⁸⁴

A receiver is not usually appointed, unless fraud is clearly proved by affidavit, or where it is shown that immediate damages will ensue if the property is not taken under the care of the court, before an answer is put in. There must be strong special grounds to induce the court to interfere by way of appointing a receiver before an answer.⁸⁵

While it is true that the appointment of a receiver *pendente lite* is a matter of discretion with the court, it is not a matter of arbitrary discretion; facts must exist and be made to appear to the court warranting the exercise of the power, and justify the taking into its possession the property in controversy. To justify such action of the court it is essential that the complainant should show, either a clear legal right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to the satisfaction of his demand, and it must appear that the possession of the property by the defendant was obtained by fraud, or that the property itself or the income from it is in danger of loss from neglect, waste, misconduct or insolvency of the defendant.

83—*Baker v. Mayo*, 86 Ill. App. 86.

85—*Baker v. Backus*, 32 Ill. 79.

84—*Brabrook Tailoring Co. v. Belding*, 40 Ill. App. 326.

The plaintiff must show a case of adverse and conflicting claims to the property and must also show some emergency or danger of loss demanding immediate action, and that his own right is reasonably clear and free from doubt. If the dispute is as to the title only, the court very reluctantly disturbs the possession by the appointment of a receiver. It must also appear that the complainant has a cause of action against the defendant and that the benefit to result from his recovery will either be wholly lost or substantially impaired by reason of the insolvency of the defendant, unless a receiver is appointed. But the insolvency of the defendant alone will not warrant a court in the appointment of a receiver.

As against the defendant in possession and enjoyment of the real property which is the subject of litigation, courts of equity always proceed with great caution in appointing receivers.⁸⁶

The mere power in a court of equity to appoint a receiver *pendente lite*, to preserve the property, does not include the power to authorize him to sell and convey the real estate belonging to the defendant. The court may, on a proper showing, appoint a receiver to take charge of the assets of an insolvent corporation, and save the same from destruction and waste, before acquiring jurisdiction to adjudicate upon the rights of the corporation. In such case the receiver may be authorized to hold the property until the rights of the parties are settled and determined. The appointment of a receiver in such case is in the nature of an equitable attachment, whereby the court acquires, through its officers, the custody of the property and assets to be retained until it has acquired jurisdiction.⁸⁷

§ 2256. Appointment of Receivers in Mechanic's Liens—
Under the Mechanic's Lien Act of 1895 courts were given

86—*Lamker v. Kalberlah*, 105 Ill. App. 445; *Watson v. Cudney*, 144 Ill. App. 624.

87—*St. Louis & Sandoval C. & M. Co. v. Sandoval C. & M. Co.*, 111 Ill. 32.

power to appoint receivers of property, on which liens are sought to be enforced, in the same manner, and for the same causes, and for the same purposes as in cases for the foreclosure of mortgages. But such powers did not exist under the act of 1874, nor in the amendment thereto in 1887. In the absence of any statutory provision authorizing it to be done, the complainant in an action for the foreclosure of a Mechanic's lien, is not entitled to a receiver of the rents and profits of the property *pendente lite*.⁸⁸

§ 2257. Receiver Continued After Decree and Before Sale—Where the stipulation on the mortgage is that a receiver may be appointed and hold during the pendency of the suit, it is not error to continue the receiver after the entry of the decree, but before a sale of the premises, and there are further steps to be taken in the case. The case is pending till it is finally disposed of.⁸⁹

§ 2258. Receiver Appointed After Final Decree—While it rarely happens that courts are called upon to appoint a receiver after a final decree in the cause, the power of appointment after decree is well settled and is exercised in cases of great emergency or where the relief is indispensable for the protection of the parties in interest.

The necessity of appropriating the rents to the payment of the mortgage debt may frequently not appear until after both decree and sale. The amount due is often a matter of dispute, and can only be determined by the decree, and what the property will sell for can only be ascertained with certainty from the result of a judicial sale. If the appropriation of the rents on the indebtedness is justified by the surrounding facts before the sale, no good reason is seen and more weighty facts existing after the sale may not warrant a similar proceeding. The security, plainly, is not exhausted by the sale, for there is a fund included

88—Stone v. Tyler, 173 Ill. 147.

89—Bagley v. Illinois T. & S.
Bank, 199 Ill. 76.

in it which is secondarily liable. It may be true that the mortgagee has elected to foreclose and sell, but when he has pursued that remedy to the end and without satisfaction of his debt, he may avail himself of any just and equitable means of collecting the residue. Both upon the principles that lie at the foundation of a chancery suit, and upon authority, a receiver may sometimes be allowed after a decree and sale, and that the mortgagee does not, in all cases, exhaust his security by a foreclosure and sale.⁹⁰

Where the occasion for the appointment of a receiver arises *pendente lite*, the occasion does not always cease with the entry of a decree of sale.⁹¹

§ 2259. Receiver Appointed on Deficiency Decree—Where the premises do not sell for enough to pay the amount found due by the foreclosure decree and the costs of the proceeding, and there is a deficiency, the practice is a proper one to apply to the satisfaction of such deficiency, through a receiver, the rents which may accrue upon the premises covered by the mortgage during the redemption period; this may be done by a court of equity, although the mortgage is silent upon the subject of the application of the rents to the payment of any deficiency that may remain after the sale of the land covered by the mortgage.⁹²

A court of equity has power, in a proper case, to appoint a receiver of the rents and profits of the mortgaged property and apply the rents and profits thereof to the payment of the deficiency. So where the original mortgagors are dead, and their estate is insolvent, under such circumstances it is eminently proper for the court to appoint a receiver of the rents and profits accruing during the period of redemption.⁹³

90—Haas v. Chicago Building Society, 89 Ill. 498.

91—Ryan v. Illinois T. & S. Bank, 100 Ill. App. 251.

92—Prussing v. Lancaster, 234 Ill. 462.

93—Lancaster v. Prussing, 139 Ill. App. 33; Walker v. Karsten, 115 Ill. App. 130; Ball v. Marske, 100 Ill. App. 389.

By the appointment of a receiver the mortgagee obtains an equitable lien on the rents and profits of the land during the statutory period redemption, if necessary, for the payment of the deficiency in the security.⁹⁴

The indebtedness, however, must be an existing indebtedness, which the mortgagor is liable to pay during the running of the time for redemption and which he neglects to pay.⁹⁵

And where a trust deed provides that on default in the payment of the debt the trustee may take possession of the property, and collect the rents, issues and profits thereof, it is not erroneous to appoint a receiver after a deficiency decree has been entered.⁹⁶

The necessity of the appropriation of the rents and profits to the payment of the mortgage debt may frequently not appear till after a decree and sale. The amount due is often a matter of dispute, and can only be determined by the decree, and what the property will sell for can only be ascertained with certainty from a judicial sale. If an appropriation of the rents on the indebtedness is justified by the surrounding facts before a sale, no good reason is seen why the same and more weighty facts existing after a sale may not warrant a similar proceeding. The security is not exhausted by the sale, for there is a fund included in it which is secondarily liable. It may be true, that the mortgagee has elected to foreclose and sell, but when he has pursued the remedy to that end and without getting satisfaction of the debt, he may avail himself of any just and equitable means of collecting the residue—not that he may have such extraordinary remedy in all cases of deficit of the proceeds, but only where it is indispensably necessary for his protection, and just and equitable.

The appointment of a receiver, however, is a power which

94—*Oakford v. Robinson*, 48 Ill. App. 273.

96—*Walker v. Kastner*, 115 Ill. App. 130.

95—*Bogardus v. Moses*, 181 Ill. 554.

the chancellor should be slow to exercise, except in extreme cases, and to prevent palpable wrong and injustice.⁹⁷

Although one of the parties liable for the amount secured to be paid by a mortgage may agree with the purchaser that he will pay the purchaser a certain amount on condition that he purchase the premises at the full amount of the decree and costs, this would not entitle him to have the receiver continued after such sale as against the owner of the equity of redemption. Whatever part of the decree had been paid to the purchaser to induce him to bid the full amount due, and thus prevent a deficiency decree, he would get back in case of a redemption from the sale. In case the premises should not be redeemed the party so paying would be entitled, under the agreement alleged, to an interest in the title to the premises acquired by the purchase at the master's sale.⁹⁸

In no event would a court of equity have power under a naked bill in aid of an execution to appoint a receiver of the real estate involved and the rents, issues, income and profits thereof, especially where no showing is made in support of the application therefor.⁹⁹

But an order appointing a receiver of an insolvent upon a creditor's bill, of all the estate of the debtor, real, personal and equitable, is sufficiently broad and ample to authorize the receiver to collect the rents accruing on the real estate.¹

§ 2260. Parties to Proceedings in Regard to Receivers—

It is fundamental that all persons having either a legal or equitable interest in the subject matter of a receivership should be made parties to a proceeding in regard to receivers.

In a proceeding for the appointment of a receiver, the

97—Haas v. Chicago Building Society, 89 Ill. 498.

98—Bogardus v. Moses, 181 Ill. 554.

99—Rice Co. v. McJohn, 244 Ill. 264.

1—Rice Co. v. Agnew, 147 Ill. App. 468.

party whose property it is proposed to be taken in charge by the court should be made a party to such proceeding.²

A receiver being in the actual possession of the property involved in the litigation, is a necessary party to a proceeding affecting the property; otherwise a judgment in the case would not affect him.³

Where the rights of a receiver can be protected as well whether he is made complainant or defendant, the fact that he is made a defendant is a matter of no consequence.⁴

§ 2261. Pleadings and Practice in Appointing Receivers—Facts, Not Conclusions, to be Stated in Bill—When a chattel mortgage, by its covenants, gave the mortgagee the right to foreclose the same in the event of his feeling his security was unsafe and insecure, an allegation in the bill that the mortgagee took possession of the mortgaged property because he felt himself unsafe and insecure in said indebtedness and security is but the expression of a conclusion without reason or instance to support it. Such an allegation is insufficient to support a right to take possession of the mortgaged property, where it is personal property, much less to form the basis of an order so far reaching as the appointment of a receiver. In a bill of this character it is not sufficient to state conclusions; facts must be stated upon which the mind of the court can reach the conclusion that the security is imperiled. Such acts must arise from the acts of the parties or changes in values occurring subsequent to the execution of the mortgage. The contention that an averment of such facts are not essential because the mortgagee was in possession of the property at the time of filing is without force. The complainant in appealing to a court of conscience is bound to establish that he has proceeded equitably in all that he has done in regard to his claim.⁵

2—*Baker v. Backus*, 32 Ill. 79.

5—*Watson v. Cudney*, 144 Ill. App.

3—*Chicago C. Ry. Co. v. People*, 116 Ill. App. 633.

624.

4—*Thayer v. Wilmington Star M. Co.*, 105 Ill. 540.

§ 2262. Prayer for Appointment of Receiver Necessary—

It is error to appoint a receiver, although a mortgage may authorize such an appointment, unless there be a prayer therefor in the bill.⁶

§ 2263. Receiver Appointed Only on Verification—A petition for the appointment of a receiver must be verified. If the motion is based upon the allegations of the bill, it must be sworn to. An unverified bill presents no competent evidence tending to justify the appointment of a receiver. Unless the bill is verified there is no evidence that any of the covenants of the mortgage have been broken.⁷

§ 2264. Effect of Filing General Demurrer to Bill—Where a receiver files a general demurrer to a bill filed against him, such an act constitutes a general appearance on his part, and admits the material allegations of the bill; and if the demurrer is overruled calls upon the receiver for an answer.⁸

After such an appearance the court will not dismiss the suit on such grounds as are urged in the demurrer.

§ 2265. Effect of Default by Defendant to Bill—A party against whom a bill has been taken as confessed for want of appearance cannot assign as a cause for error that the proof does not sustain the allegations of the bill. It is a matter of discretion with the court, under our practice, whether under such circumstances it will hear evidence or not.

A distinction exists between decrees *pro confesso* under the statute for the want of an appearance, and decree *pro confesso* for want of an answer after appearance. In the former, there being no one on whom the plaintiff can serve notice, all the necessary proceedings may be *ex parte*.⁹

§ 2266. Effect of Motion to Vacate Order Appointing Receiver—Where a motion to vacate the order appointing a

6—Gillespie v. Green County S. & L. Assn., 95 Ill. App. 543.

7—Daley v. Nelson, 119 Ill. App. 627.

8—Fox River Paper Co. v. Western Envelope Co., 109 Ill. App. 893.

9—Armstrong v. Douglas Park Building Assn., 60 Ill. App. 318.

receiver is made at the same term at which the appointment is made, it is entirely competent to entertain and dispose of the motion at a subsequent term, and it makes no difference that one term was held by one judge and the subsequent term was held by another judge. It is the same court, and the presiding judge had the same power to correct and amend the orders of the judge who occupied the bench at the preceding term that he would have to amend the orders entered by himself.¹⁰

§ 2267. Amendments to Proceedings for the Appointment of Receivers are allowed under the statute of amendments, where they are necessary for the administration of justice.

So an amendment to a declaration by inserting the word "as" between the name of the defendant and the word "receiver" is allowed; such action of the court is not erroneous as it makes the declaration express what both parties understood it to mean in its unamended form. The amendment does not set up a new cause of action, and there will be no error in sustaining a demurrer to the plea of the Statute of Limitations.¹¹

§ 2268. Rights and Powers of Foreign Receivers—It is a general rule that a receiver appointed by a foreign court will not be allowed to maintain an action against an insolvent debtor residing in this State to the detriment of a resident creditor of the insolvent. In other words the courts of this State will protect its citizens against the claims of non-residents. It is a principle of law that a receiver appointed by a foreign court takes no title to debts due such foreign debtor. But these principles do not apply to a receiver of a foreign insolvent appointed by the courts of this State and under its law, although the suit may be instituted by a non-resident creditor.¹²

And although the property may be beyond the jurisdic-

10—Pringle v. James, 109 Ill. App. 100.

12—Holbrook v. Ford, 153 Ill. 633.

11—Wilcke v. Henrotin, 241 Ill. 169.

tion of this State, yet if the party who causes the property to be attached is within this State and within the jurisdiction of the court, although the court may not have jurisdiction of the property, it has the power to reach the party who seeks to prevent the receiver from getting possession of the goods, and the court has the power to enforce its order requiring the party to dismiss his suit by imprisonment for contempt of court on his failure to do so.¹³

§ 2269. Suits by Receivers—The foundation of the rule, that a receiver must first obtain an order from the court before he can prosecute or defend an action is, that the court must determine for itself whether the expenses of the litigation should be incurred. And where the litigation participated in by a receiver is ended, and during its progress no objections have been made to his actions on the ground that he was proceeding without an order permitting him to do so, the absence of such order can only be material in determining whether the receiver shall be allowed costs and expenses incurred by him, or in determining what disposition shall be made of the results of the litigation. It will not be contended that where a receiver has instituted a proceeding without such an order, or his actions may not be approved by the court so as to give it the same effect as though the order had been made in the first place; and where he has obtained moneys or other assets as the result of such proceeding, he cannot part with them without the consent of the court. Even when money is paid to him by mistake, the court alone can order its repayment.¹⁴

Where the legal title to a note is in a bank, though a receiver has been appointed, he has a right to sue in the name of the bank to collect the note. It is no objection to the action that a usee is not named therein. The debtor

13—*Sercomb v. Catlin*, 128 Ill. 556.

14—*Smith v. United States Ex. Co.*,
135 Ill. 279.

is protected in paying the judgment in favor of the legal holder, and the question of the beneficial interest does not concern him; that is a question affecting only holder and the beneficiary.¹⁵

Where it is uncertain whether a receiver of an insolvent bank is clothed with the legal title of the bank, or the claims existing in favor of the bank, it is proper to bring suits by the receiver in the name of the bank, and, also, if suits were to be defended, it is proper to defend in the name of the bank.¹⁶

A receiver appointed under the power conferred by section 25 of chapter 32 (Corporations) of the Revised Statutes, is authorized to bring suit without special leave of the court appointing him.¹⁷

And he may sue in his own name.¹⁸

Under the statutes of the United States in regard to national banks a receiver of such a bank may sue a claim due an insolvent bank either in his own name or in that of the bank.¹⁹

Where a bond and mortgage are executed to a receiver of an insolvent bank, and a successor is appointed by an order which vests in the successor all the property and assets of the bank in the hands of the original receiver, though at law such successor might not be able to maintain a suit in his own name, but must sue in the name of the original receiver, yet, being an equitable assignee, he may in equity maintain a bill to foreclose the mortgage in his own name, though there may not have been a regular assignment to him by the original receiver.²⁰

Where a suit is commenced in the name of the receiver of an insurance company, it is error for the trial court to

15—Chicago Fire Proofing Co. v. Park Nat. Bank, 44 Ill. App. 150.

16—Smith v. United States Ex. Co., 135 Ill. 279.

17—Hanke v. Blattner, 34 Ill. App. 394.

18—Rowell v. Chandler, 83 Ill. 288.

19—Chicago F. P. Co. v. Park National Bank, 145 Ill. 481.

20—Iglehart v. Bierce, 36 Ill. 133.

refuse to allow an amendment to the declaration substituting the name of the insurance company as plaintiff.²¹

A receiver has power to commence and prosecute a suit in forcible entry and detainer without special direction of the court appointing, especially where the lease is signed by him as receiver.²²

§ 2270. Receiver to Show Appointment and Authority to Prosecute Suit—In general, a receiver, before he may sue, must show that by the appointment of the court, properly made, in a matter within its jurisdiction, authority has been conferred upon him, in his representative capacity as receiver, to prosecute the action; and failing to show this he cannot prosecute the action.

It is true that there are respectable authorities which seem to hold a contrary doctrine, but they are cases in which the question does not appear to have been raised or the right of the receiver to sue depends upon some special statute.

Section 25 of the Corporation Act gives the receiver appointed under that section authority to sue only in the name of the receiver of such corporation, "as commanded by the decree of such court."

To allow a receiver to sue without such authority would produce a precedent calculated to encourage litigation at the expense of insolvent estates for the benefit of receivers and their attorneys, who might be inclined to profit by such litigation.

The receiver should be at all times the servant of the court and should look to it for his authority, unless the legislature in its wisdom, should see fit to vest him with greater authority which the court thinks has not been done by said section.²³

A receiver ought not to be allowed to commence an im-

21—Chandler v. Frost, 88 Ill. 559.

23—Peabody v. New England W.

22—McKeag v. Pirie, 134 Ill. App. W. Co., 80 Ill. App. 458.

portant suit without direction and specific authority from the court appointing him.²⁴

§ 2271. Claims Against Estate in Hands of Receiver—It is a well-settled practice to allow parties having claims against a person or corporation whose affairs are in the hands of a receiver to come into court by intervening petition and have their claims adjusted; so it is said that where any person claims to be entitled to an estate or other property in an estate sequestered he should apply to the court to direct an inquiry as to whether the applicant has any and what interest in the property. This inquiry is called an examination *pro interesse suo*.

Where the claim is for an alleged tort or the damages are unliquidated and unascertained the court may, in its discretion, properly send the case to a jury to settle the legal rights of the parties and ascertain the damages, retaining the case for the ultimate disposal by the court. But where the rights of the parties are settled there is no occasion for a jury.²⁵

It is improper for the trial court in allowing a claim against the estate of the defendant to order it paid forthwith; the costs of liquidation, including the receiver's charges, are primarily payable from the assets of a concern in liquidation, and these should be paid before the receiver pays other claims.²⁶

If there are several creditor's suits, each claimant is paid according to his priority as ascertained by the time of the filing of their respective bills and the serving of process. As between creditors it overrules the equitable principles of equality in thus rewarding superior vigilance; and the case of *Jackson v. Lahee*, 114 Ill. 287, or of *Gage v. Smith*, 79 Ill. 223, are not to be regarded as announcing a rule inconsistent with this doctrine.²⁷

24—*St. Louis, V. & T. H. R. R. Co. v. Vandalia*, 103 Ill. App. 363.

25—*Andrews v. Stanton*, 18 Ill. App. 163.

26—*Kavanagh v. Bank of America*, 145 Ill. App. 201.

27—*Russell v. Chicago T. & S. Bank*, 40 Ill. App. 385.

§ 2272. Party Owing Insolvent Cannot Offset His Claim Against the Insolvent—If a bank becomes insolvent and a receiver is appointed to take charge of its assets a debtor of the bank having acquired a claim against the bank after the appointment of the receiver, cannot offset such claim against his debt to the bank.²⁸

§ 2273. Rights of Parties to Jury Trial in Equitable Proceedings—The constitutional right of a party to a trial by jury, considered as an absolute right, does not extend to cases of equitable jurisdiction. If such were the case there would be many cases of equitable jurisdiction that courts of equity could not settle, because, as an incident to the main controversy, some matters would arise where the parties would be entitled to a jury if the same matter should arise as a distinct transaction in a court of law.²⁹

If a petition is filed in a chancery proceeding in which a receiver has been appointed, for the purpose of recovering damages on a claim sounding in damages, against the receiver, the rules appertaining to chancery proceedings apply rather than those followed in an action at law. The verdict of a jury in such a case must therefore be regarded as advisory only, and the chancellor is at liberty either to adopt the same or disregard it, and render a decree contrary thereto if he believes justice so demands.³⁰

§ 2274. Duty of Officer of Corporation to Order of Court—In a proceeding against a corporation in which a receiver has been appointed, an officer of the corporation cannot refuse to obey an order of the court to turn over the books and papers of the corporation to the receiver on the theory that they may contain evidence which might be used against such officer in a criminal proceeding then pending against him. The possession of the receiver is the possession of the court, and if it be found that such books and papers contain evidence which might be used against the officer

28—Ingwersen v. Buchholz, 88 Ill. App. 73.

30—First T. & S. Bank v. Lowry, 151 Ill. App. 170.

29—Shedd v. Seefeld, 230 Ill. 118.

his rights under the constitution might then be protected by proper orders by the court. The answer of such officer to a rule on him to show cause why he should not be attached for contempt of court for not obeying such order to turn over is not sufficient which merely shows that he has been indicted for a criminal offense, and that such books and papers might tend to incriminate him. His answer in such case should follow the rule with reference to the discovery and inspection of privileged documents and should point out the books and documents which he claims would be incriminating, and offer to deliver the others.

The foregoing statement is made in answer to the claim of the officer that he occupies the same position as a witness subpoenaed *duces tecum*, but the court expressed the opinion that the officer could not claim his constitutional privilege in the proceeding in the same manner that a witness *duces tecum*. There is a marked difference between such an office and such a witness. In the latter case the party is required to produce such books and papers to be used as evidence in the criminal proceeding, and in the former case the court is granting the complainant the relief prayed for in his bill; and while a court of equity will not force a party to subject himself to punishment in a criminal proceeding it will not permit him to protect himself against equitable relief by assuming that a compliance with the order to turn over will subject him to the consequences of a crime.³¹

§ 2275. Suits Commenced Against Insolvent Before Appointment of Receiver—Where a suit is regularly brought against a person prior to his adjudication of insolvency, such adjudication does not have the effect to abate or continue an existing action already existing against him. The mere fact that the property of a person has passed into the hands of a receiver should not bar a suit theretofore instituted against him to recover a demand against him. If

31—Manning v. Mercantile Securities Co., 242 Ill. 584.

the receiver desires to be let in to defend the action he should personally apply for that purpose.³²

Putting the property of a company into the hands of a receiver has no effect on a suit commenced against the corporation prior thereto, either to abate, continue or in bar such a suit.³³

§ 2276. The Corporate Existence of a Corporation Is Not Terminated by the Appointment of a Receiver, and, in general, the power of a quasi public corporation to condemn land is not transferred to a receiver, but remains in the corporation. But a court of equity having in charge the property of a railroad corporation is authorized to do any act within the corporate power the performance of which is necessary to the preservation of the property of the company for the benefit of the company and its creditors. If, when the property comes into the hands of the court, the company is engaged in some proper and legitimate undertaking the completion of which is essential to the successful maintenance and operation of the road and to the preservation of the property, the court may proceed to complete the undertaking, and, if required, will transfer and clothe its receiver with such power and authority as the corporation possessed to institute the appropriate legal proceedings to condemn any real estate which ought to be acquired in order to finish and make useful and available that which the corporation was engaged in constructing when the court displaced it in the possession of its property.³⁴

§ 2277. Bills Filed for Purpose of Hindering and Delaying Creditors, Dismissed—Where a judgment debtor is possessed of sufficient personal property to satisfy the execution, securing a return of the execution unsatisfied and the filing of a creditor's bill for the purpose of having a

32—*Mercantile Ins. Co. v. Jayne*, 87 Ill. 199.

33—*Toledo W. & W. R. R. Co. v. Beggs*, 85 Ill. 80.

34—*Morrison v. Foreman*, 177 Ill. 427.

receiver of the judgment debtor appointed to carry on his business so that he might not be annoyed by attaching and judgment creditors, the bill under which the receiver was appointed may properly be dismissed and the receiver discharged.³⁵

§ 2278. Statutes of Limitations Unaffected by Appointment of Receiver—In general, the appointment of a receiver does not affect the running of the Statute of Limitations, and the appointment of a receiver in no way affects the rights of a creditor to pursue his debtor, and the debtor may invoke the Statute of Limitations as against his creditor.³⁶

§ 2279. Receiverships in Proceedings to Dissolve Partnership—Where a bill is filed by one partner against his co-partner for the purpose of winding up the affairs of the partnership, and for the appointment of a receiver to accomplish that purpose, and a receiver is appointed who takes possession of the partnership property and assets, and proceeds in the discharge of his duties, neither a judgment thereafter recovered against the partners, nor a creditor's bill create any lien upon the assets in the hands of the receiver, so as to give such judgment creditors a lien thereon superior to that of other creditors, nor will such proceeding entitle such creditors to have their claims paid in full, where the assets of the partnership are not sufficient to pay all creditors in full.³⁷

Where a receiver is appointed in a suit to dissolve a partnership his appointment will not affect the claims of creditors of the partnership which, previous to the appointment, had become liens on the partnership property. Such liens must be recognized and enforced the same as though a receiver had not been appointed.³⁸

35—*Sterlin v. Jewett*, 63 Ill. App.

37—*Jackson v. Lahee*, 114 Ill. 287.

55.

38—*Hoffman v. Schoyer*, 143 Ill.

36—*White v. Meadowcraft*, 91 Ill. 598.

App. 293.

§ 2280. Complainant Required to Give Bond on Appointment of Receiver—It is error to appoint a receiver without the bond required by Sec. 53, Ch. 23, Revised Statutes, except for good cause shown.³⁹

To entitle a party to the appointment of a receiver, *pendente lite*, he must give the bond required by the statute of May 15, 1903, unless it is the opinion of the court that a receiver ought to be appointed without the party giving such bond, and the court's opinion must affirmatively appear in the order making the appointment. The statutory requirement in this regard cannot be dispensed with. The statute was evidently enacted for the purpose of making liable the moving party in a receivership proceeding for such damages as might result from the improvidence of his act in bringing about a receivership when none should have been asked.⁴⁰

While the failure to require such a bond may be error, still if the error be not harmful and the case is a proper one for the appointment of a receiver the order appointing one will not be set aside.⁴¹

If the appointment of a receiver is set aside as having been wrongfully appointed, an action may be maintained upon the bond by reason of such wrongful appointment.⁴²

Where the order provides that the appointee be and is hereby appointed receiver upon the complainant's executing a bond in a certain sum conditioned to pay according to the statute, the appointment is not erroneous because such order is made before the bond is actually filed and approved. The court is not inclined to place so narrow a construction on the statute. The receiver is the officer and arm of the court which appoints him, and will not be allowed on such

39—Rice Co. v. McJohn, 244 Ill. 264; Staar v. Moy Tong Koon, 145 Ill. App. 340.

40—Staar v. Koon, 145 Ill. App. 341; Ayers v. Graham, S. & L. Co., 150 Ill. App. 137.

41—Walker v. Kersten, 115 Ill. App. 130.

42—Hill Co. v. United States F. & G. Co., 157 Ill. App. 261.

an order to assume the duties of his office or appointment until the contemporaneous concerning the bond is fulfilled. The statute by such an order is complied with by such an order.

The amount of the bond is for the determination of the trial court. It is to be noted that the complainant's bond is not to take the place or secure the receiver's responsibility, and liability on his bond, or otherwise, for the property coming into his hands. But it is for the damages resulting and the attorneys' fees rendered necessary by the appointment, and the acts of the receiver if the appointment is revoked or set aside.

If the condition of the bond does not conform substantially with the statute, it is plain that the remedy is not in an appeal from the order, but in a representation in the court below concerning the insufficiency of the bond, and the consequent non-compliance with the terms on which the receiver was to be vested with his power.⁴³

§ 2281. Form of Order Appointing Receiver—Title of cause.

This cause coming on to be heard on the application of for the appointment of a receiver herein and the same having been argued by the respective counsels in the case and the court being fully advised in the matter;

It is ordered that of be and he is hereby appointed receiver of the estate and property, real and personal, things in action, debts, equitable interest, other effects of, defendant, and which belonged to or were held in trust for him at the time of the commencement of this cause, or in which he had any beneficial interest, except such property as is exempt by law from execution; and, also, except where such trust

⁴³—Anderson v. Hultberg, 117 Ill. App. 231.

property has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the said
and of the real estate described in the bill of complaint herein, to-wit: (Here describe the property), and the rents, issues, income and profits thereof, with the usual powers and duties of receivers in chancery, upon the said receiver executing and filing with the clerk of this court a bond to the People of the State of Illinois, in the penal sum of Dollars, conditioned (Here state the conditions as the court may direct), with sureties to be approved by the court. And it is further ordered that the said do assign, transfer and deliver to the said as such receiver, under the direction of the Master in Chancery all such property, real and personal, things in action, equitable interest, and other effects, except as aforesaid. And that he deliver to the said receiver, in like manner, all bills, notes, contracts, books of account, and other things and other evidence relating thereto. And that the said execute and deliver to the said receiver, under the direction of the said Master in Chancery a conveyance and assignment of the real estate mentioned in the bill herein, and hereinbefore described and of the rents, issues, and profits thereof. And that the said defendant and his tenants, and those claiming under him, attorn to the said receiver and pay to him the rents, issues and profits thereof; and that the said receiver have power to make leases of such real estate, from time to time, not exceeding one year, as he may deem advisable.

And that the said defendant appear before the said Master in Chancery, as he shall be summoned or required to do, from time to time, and produce such books, papers and accounts, and subject to such examination, as said master shall direct in relation to any matter which he may lawfully be required to disclose.

rights of third parties therein, personal property, such conduct does not amount to a breach of the condition of the bond.⁴⁶

§ 2285. Inventory to Be Filed by Receiver—It is the duty of a receiver to make out and file with the court when he is appointed, a list of the property which comes into his hands, so that the creditors and all persons interested may know what property belongs to the parties in the case wherein the receiver has been appointed. This inventory should be made as soon as possible after his appointment.⁴⁷

§ 2286. Inventory by Receivers of Banks—Statute—In 1879 it was enacted “That it shall be the duty of the receiver or assignee of any savings or other banks, or any private banker or firm doing a banking business immediately upon a request made to him therefor, in writing, signed by any ten depositors of such bank, of which he shall be the receiver or assignee, to make and file in the court in which the cause is pending a detailed statement (which statement may be published if the court shall deem proper), showing all the assets of such bank, of whatever kind or nature and of all promises to pay, of whatever kind or nature, showing:

1. When such promises were made or arose.
2. When they were or are due.
3. The names of the persons making such promises.
4. The thing to be paid, and if money, the amount thereof, the rate of interest thereof, if any, and the amount of the interest due and unpaid thereon, if any.
5. Whether the payment of such debt has been extended, and if so, from when and how many times.
6. A particular description of whatever collateral security or guarantee thereof such bank may have, and if it be that of a person, the name of such person.

Which detailed statement shall be open to the inspection

⁴⁶—*People v. Murdock*, 50 Ill. App. 311.

⁴⁷—*Heffron v. Rice*, 149 Ill. 216.

of all parties in interest, and also a statement taken from the books of such bank, the names and addresses if known, of all of the stockholders, the number of shares held by each, when acquired and from whom.'⁴⁸

§ 2287. **Powers and Authority of Receivers**—A receiver is to be regarded as the representative not only of the party for whom he was appointed, having power to assert his rights, but occupying a still broader position, for he represents not only the party, but also his creditor and under his duties as the representative of the latter class he is invested with the power and may do acts that could not be done by a mere representative of the insolvent party, and where, in a proceeding, he occupies the latter status, he may do, and under some circumstances must do, many things, which, if his acts were strictly limited to those of a representative of the insolvent, he could not do. He represents both the creditors and the defendant, having the right to assert any defense which the creditors, in contradistinction to the defendant, are entitled to assert. And where there has been fraud and collusion in obtaining a judgment against the insolvent, for which a receiver has been appointed, and the effect of such judgment will be to diminish the estate in the hands of the receiver, or which would properly come to him, or which would prevent the proper distribution to those equitably entitled thereto, the receiver has such a standing in court with reference to the estate for the purpose of closing out the estate he may appear and collect what is properly due and owing the insolvent, and defend, not only the insolvent, but protect the creditors and stockholders from collusive and fraudulent judgments.⁴⁹

Where a receiver is appointed in a proceeding against a mutual fire insurance company to wind up its affairs, the court exercises at its discretion not only the powers of the

48—Laws 1879, p. 236.

49—Peabody v. New England W. Co., 184 Ill. 625.

board of directors of the company but also such additional power as is conferred by the statute.⁵⁰

Where a receiver has once obtained rightful possession of personal property situated in the jurisdiction of the court appointing him, he will not be deprived of such possession though he take the property, in the performance of his duty, into a foreign jurisdiction; that while there it cannot be taken from him by the creditors of the insolvent debtor, residing in that jurisdiction.

But as against the claims of creditors of an insolvent debtor residing in this state an officer of a foreign court has no right or power to remove from this state the assets of such insolvent debtor situated herein, at the time of the officer's appointment and of which he had no previous possession.⁵¹

Where the purchaser at a foreclosure sale of property, consisting of a coal mine, petitions the court to appoint a receiver of the property for the purpose of preserving the property and keeping in good condition, on the appointment of such a receiver to take possession of the mine and operate it during the period of redemption, he has authority to employ miners for that purpose and to pay them out of the moneys obtained by the operation of the mine; and if such moneys are not sufficient for that purpose, the mining plant under the provisions of the Act of 1895 in regard to the working of coal mines (Laws of 1895, p. 242), will be liable for their services.⁵²

The statute reads as follows: "That every laborer or miner who shall perform labor in opening and developing any coal mine, including sinking shafts, constructing slopes, or drifts, mining coal and the like, shall have a lien upon all the property of the person, firm or corporation owning, constructing or operating such mine, used in the construc-

50—*Rand v. Mutual Fire Ins. Co.*,
58 Ill. App. 528.

51—*Chicago, M. & St. P. R. R. Co.*
v. Keokuk N. L. P. Co., 108 Ill. 317.

52—*Traylor v. Barry*, 96 Ill. App.
644.

possession of property, which it is claimed belonged to the defendant, the receiver acts at his peril if he interferes with it.⁵⁸

Where a contract entered into between a party and the insolvent is, at the time a receiver is appointed for the insolvent, a valid and subsisting contract, which fixes the obligations and determines the rights of the parties thereto the receiver is not clothed with any power to do any act which might impair the obligation of such contract.⁵⁹

While a receiver comes in subject to all burdens upon the property, it has never been contended that he succeeds to the exercise of the volition of any party.⁶⁰

§ 2288. Powers of Receivers Only Co-extensive with Jurisdiction of Court Appointing Them—The courts of Illinois will not enforce the insolvent laws of another State by giving effect to a statutory assignment of the effects of the debtor residing in such other State.

Neither the laws of another State or country, nor the adjudications of the courts thereof, by which trustees are appointed to take charge of the property and effects of an insolvent debtor and distribute the proceeds, can have any extra territorial effect. They are strictly local, and affect nothing more than they can reach. An assignment, *in invetum*, by virtue of or under a foreign law does not operate upon a debt or right of action as against a person in Illinois or suing there.⁶¹

The general rule is, that the power of a receiver is co-extensive only with the jurisdiction of the court which appoints him. He has no extra territorial power of official action. But a receiver appointed by one State may, by comity, be permitted to receive the possession of property

58—*Christie v. Burns*, 83 Ill. App. 514.

59—*Wolf v. National Bank of Illinois*, 178 Ill. 85; *Chemical Nat. Bank v. Hartford Dep. Co.*, 156 Ill. 522.

60—*Juillard v. Walker*, 54 Ill. App. 517.

61—*Rhawn v. Pearce*, 110 Ill. 350.

in another State, provided no citizen or suitor of the latter State is thereby prejudiced or injured.⁶²

§ 2289. Courts Without Power to Control Parties Outside Their Jurisdiction—It is the declared policy of the State of Illinois to guarantee to its own citizens the right to pursue their remedies in the courts of Illinois to the exclusion of the claims of all foreign receivers of assignees. Neither a voluntary assignment nor one purely statutory from a foreign jurisdiction, nor a receiver appointed by a foreign court, can successfully hold property of which he has not obtained possession in the jurisdiction appointing him, against attaching creditors of the insolvent's estate who are citizens of Illinois.

This being the rule in Illinois, why should she seek to deny to citizens of other States the same right in the courts of such States that which it insists on retaining for its own citizens in the State of Illinois? So to do is in violation of the spirit, at least, of our national constitution, and to make an unwarranted distinction between citizens of different States placed in precisely the same situation. The jurisdiction of our courts is only co-extensive with our State. They cannot legally send their process into other State and jurisdictions for service, and the court was of the opinion that neither the law nor comity between distinct States or national organizations sanction the authority of one such body to exercise jurisdiction over the citizens and their property while both are beyond the jurisdiction of the tribunal in which the proceeding is pending. The courts of this State cannot restrain the citizens of another State from performing acts in another State or elsewhere outside of and beyond the boundary lines of the State. Any other practice would necessarily lead to a conflict of jurisdiction.⁶³

§ 2290. Powers of Receivers Under the Torrens System—It is provided by the statute creating the Torrens System

62—*Sercomb v. Catlin*, 128 Ill. 556.

63—*Hawley v. State Bank of Chicago*, 134 Ill. App. 96.

that before a receiver shall deal with or transfer registered land or any estate or interest therein, he shall file in the registrar's office a certified copy of an order of the court showing that such receiver is authorized to deal with or transfer such land, estate or interest, and if it is in the power of such person he shall present to the registrar the duplicate certificate of title. In case of a deed of the land to the receiver the same shall be filed in the registrar's office as in other cases.⁶⁴

§ 2291. Title to Property Not Affected by Appointment of Receiver—It seems to be well settled that the title to property is not affected by the appointment of a receiver. By virtue of his appointment the receiver gets only such rights of possession as the parties had for whom he is appointed. He cannot have the right to take possession of property, where the owner of the estate for whom he is appointed would have no right to do so. A court of equity is bound to respect the rights and preferences acquired lawfully.⁶⁵

There is no known rule of law, independent of a statute, that holds the appointment of a receiver transfers the title to real or personal property to the person thus appointed. Nor can it be conceived how such an appointment can have that effect. The officer, by his appointment, is authorized to take and hold possession of the property, under the control and direction of the court. And his possession is that of the court. The general practice seems to be, when necessary for the recovery or preservation of personal property by the receiver, the defendant will be required by the court to assign it by a proper written instrument to the receiver. In reference to personal property such an assignment may not be necessary, but the courts frequently require it. But where it is necessary to execute leases, or to bring ejectment and the like for real estate, an assignment or conveyance

64—Sec. 123, Ch. 30, "Conveyances," R. S.; Hurd's Stat. (1912), p. 543.

65—Gillam v. Nussbaum, 95 Ill. App. 277; Peterson v. Lindskoog, 93 Ill. App. 276.

to the receiver is believed to be necessary in all cases. The form of such a conveyance is given Edwards on Receivers, p. 86. The court may authorize and empower a receiver, like a master in chancery or special commissioner, to sell real estate by a decree of the court. This is not doubted, but he in such case receives no title to the property. But if by his appointment or by a conveyance he becomes invested with the title to real estate, he takes the property for the benefit of the lien holders and creditors.⁶⁶

There is no statute in Illinois conferring title on a receiver who may be appointed by a court, and in the absence of such a statute, it is well settled law that the receiver can only acquire title by a conveyance. The title to the property is not changed by the appointment; the mere order of appointment does not vest the title to the property. All the receiver acquires by the order is the right of possession, as an officer of the court.⁶⁷

Where a bill is filed calling for the appointment of a receiver the court may require the defendant to deliver to the receiver on his appointment all property in his possession not exempt from execution. If third persons claim the property, they may present their claims to the court to have them adjusted, or apply to the court for leave to sue the receiver.⁶⁸

§ 2292. Right of Receiver Subject to All Valid Existing Liens—The right of a receiver to the possession of the property ordinarily is subject to all valid and existing liens on the property at the time of his appointment, and does not divest a lien previously acquired in good faith.⁶⁹

The order appointing a receiver gives him no authority

66—Union Trust Co. v. Weber, 96 Ill. 346.

67—Heffron v. Gage, 149 Ill. 182; Thomas v. VanMeter, 164 Ill. 304; Vandalia v. St. Louis, V. & T. H. R. R. Co., 209 Ill. 73.

68—Heise v. Starr, 44 Ill. App. 406.

69—Chicago T. & T. Co. v. Smith, 158 Ill. 417; Gillam v. Nussbaum, 95 Ill. App. 277; Peterson v. Lindskoog, 93 Ill. App. 276; Mulcahey v. Strauss, 151 Ill. 70.

as against the rights of parties over whom the court has not acquired jurisdiction, and the court cannot deprive such parties of a rightful possession, if they hold such.⁷⁰

Prior lien on property sold by order of court and by like order transferred to the proceeds of such sale can not be divested against the consent of the party holding such lien for the benefit of other creditors or to meet the fees and expenses of a receiver incurred in conducting a business by order of the court.⁷¹

Where a particular fund in the hands of an insolvent constitutes a trust fund, the receiver of the insolvent takes it subject to the same rights of the beneficiary that existed against it in the hands of the insolvent.⁷²

§ 2293. Receiver Succeeds to Rights of Insolvent Only—A receiver is clothed with such rights of action as might have been maintained by the person over whose estate he has been appointed and to whose rights for the purpose of litigation he has succeeded.⁷³

When a receiver is appointed for a bank he succeeds to all the rights of the bank to its property, claims and demands, to sell, dispose of and reduce to money to be paid under the orders of the court to the creditors of the corporation according to their rights. He does not become a trustee or guardian for the depositors, to manage, control, settle or enforce their individual claims by suit or otherwise.⁷⁴

§ 2294. Insolvent Estopped from Prosecuting Claim, Receiver Estopped—Where an insolvent firm is estopped from asserting a claim, its receiver is also estopped.⁷⁵

On the petition of the State Auditor to wind up the affairs of an insurance company the appointment of a receiver

70—Christie v. Burns, 83 Ill. App. 514.

71—Mears v. Hayden, 91 Ill. App. 343.

72—National L. I. Co. v. Mather, 118 Ill. App. 491.

73—Burch v. West, 33 Ill. App. 359.

74—Wincock v. Turpin, 96 Ill. 135.

75—Gottlieb v. Miller, 154 Ill. 44; Great Western T. Co. v. Loewenthal, 154 Ill. 261.

property in the possession of the receiver, and the legal title is in the receiver when it is voluntarily placed there by the proper party. The court is made the custodian of the property to administer, manage and sell it for the best interest of all. And where the property is so situated that it cannot be sold separately without damage to the property it may be sold *en masse*. And an order of sale without redemption may not only be proper but there are circumstances where it would be improper not to do so.⁸¹

But on a review of the case by the Supreme Court it was held that while it might be proper to sell the various tracts of land and the fixtures attached thereto as one piece of property, yet where the distinctive personal property constituted but a small portion of the assets of the insolvent, and could be easily separated from the other property it was error to sell such personal property *en masse* with the real estate.

In regard to selling the property without the right of redemption, the court reviews the statutes in that regard, and the cases relied on to support the decree, and comes to the conclusion that every circumstance which may be held to take the case out of the provisions of the statute which requires judicial sale of real estate to be made subject to the statutory right of redemption seems to be wanting; and while the court is disposed to adhere to the doctrine of the cases relied upon justifying the sale of property without the right of redemption, it was not inclined to extend the rule there laid down to cases which do not come clearly within the reason upon which the rule is based.

The case involved the sale of a coal mine in full operation and it was urged in support of the decree that if the statutory redemption was allowed, neither the receiver, the defendant nor the purchaser could be permitted to mine

81—Locey Coal Mines v. Chicago, W. & V. Coal Co., 28 Ill. App. 485.

coal for sale while the period of redemption was running, and in order to keep the mine from depreciation and injury during that period, the water kept out and fresh air applied at great costs; that this expense should not be borne by the receiver as he could no longer work the mines, and the defendant, being insolvent, was presumably unable to redeem, and would have no inducement to incur such an expense; and the purchaser, not being entitled to the possession until after the expiration of the period of redemption, could not legally enter upon the mines for the purpose of protecting them from destruction.

It is said by the court in reply to these suggestions that inconveniences would doubtless arise but they would not in the opinion of the court justify the court in disregarding or overruling the plain provisions of the statute in regard to the subject of redemption.

It was also urged in support of the decree that the court, through its receiver, had the entire control, both of the equitable and legal title to the real estate in question, and could dispose of it in such manner as it saw fit. But it was replied that the property was conveyed to the receiver under an order of the court. The control which the court obtained over the property was no greater or different than it would have been if the order had been entered as the result of adversary proceedings against the opposition and protest of the defendant. The question then arises, whether, on a creditor's bill, a court, by requiring real property, which might have been seized and sold on an execution at law to be conveyed to a receiver, can thereby take it out of the operation of the statute in relation to redemption. A creditor's bill may be viewed as a species of process for the execution and enforcement of a judgment at law, and it is difficult to see why real property seized and sold in that proceeding should not be subject to redemption the same as when sold on execution.

And the decree of the circuit court and the judgment of the Appellate Court were both reversed.⁸²

Where the receiver sells to a single purchaser at the same time all the assets of the insolvent, such a sale does not include items which are not inventoried nor included in the petition for leave to sell.⁸³

The fact that the purchaser at the receiver's sale is also the complainant in the case does not serve to retain the jurisdiction of the court over him as such purchaser with reference to his subsequent conduct in regard to the property, or with third persons, he having performed his contract of purchase and received possession of the property. As a purchaser at the receiver's sale the complainant took the title of the property bought by him exactly the same as he would have done if he had been a stranger to the suit; and the court which ordered the sale lost all jurisdiction over him as a purchaser and over the subject matter of the purchase, as soon as he had completed his purchase, took possession of the property, and the court had approved of the sale.⁸⁴

§ 2296. Rents, Issues and Profits of Mortgaged Lands—Rents accruing before filing the bill of foreclosure, belong to the owner of the equity of redemption, and not to the mortgagee. They are not subject to the mortgage lien.⁸⁵

If the sale of the premises on the foreclosure of the mortgage, fully satisfies the decree in favor of the complainant, the right to the possession of the premises, and the rents and profits thereof, during the period of redemption belong to the owner of the equity of redemption.⁸⁶

Where the deficiency decree is not rendered against the owner of the equity of redemption, and he is not made liable

82—Locey Coal Mines v. Chicago, W. & V. Coal Co., 131 Ill. 9.

83—Illinois Steel Co. v. Preble M. W. Co., 116 Ill. App. 268.

84—McDonald v. Miller, 54 Ill. App. 325.

85—Gandy v. Coleman, 196 Ill. 189.

86—Cohn v. Franks, 96 Ill. App. 206; Haigh v. Carroll, 209 Ill. 576; Bogardus v. Moses, 181 Ill. 554; Dale v. Davis, 51 Ill. App. 328.

for the mortgage debt, he is entitled to the rents and profits of the mortgage property up to and until the time of redemption has expired, and the appointment of a receiver does not deprive him of this right.⁸⁷

The inclusion in a mortgage of the rents and profits with the appurtenances to the lands described is not enough to deprive the mortgagor of the right to receive the rents to his own use, where the mortgagor neither gets, attempts to get, nor demands possession either before or after condition broken.⁸⁸

§ 2297. Rents, Issues and Profits Pledged as Security for Debt—Most mortgages and trust deeds contain clauses substantially as follows: "Upon the filing of any bill to foreclose this mortgage, in any court having jurisdiction thereof, such court may appoint any proper person receiver, with power to collect the rents, issues and profits arising out of said premises during the pendency of such foreclosure suit, and until the time to redeem the same from any sale that may be made under any decree of foreclosure shall expire; and such rents, issues and profits which are collected may be applied toward the payment of the indebtedness and costs herein mentioned and described. And to pay any rents which may be collected after such sale and before the time of redemption expires to the purchaser or purchasers at such sale or sales."

Under such a clause in a mortgage a lien is given in express words, upon the rents and profits, and such an equitable lien a court of equity will enforce. Rents and profits are subjects which may be mortgaged.

It has been repeatedly held that a provision in the mortgage for the appointment of a receiver in case of a foreclosure to collect the rents and profits until the expiration of the period of redemption authorizes the appointment of

87—*Standish v. Musgrove*, 223 Ill. 500; *Davis v. Dale*, 150 Ill. 239; *Stevens v. Hadfield*, 178 Ill. 532. 88—*Silverman v. Northwestern M. L. I. Co.*, 5 Ill. App. 124.

a receiver regardless of the insolvency of the mortgagor. In all such cases the lien is voluntarily created by the mortgagor. He pledges not only the land but also the rents and profits for the payment of the debt.⁸⁹

Such provisions have the effect of constituting a mortgage of the rents and profits of the premises described in the mortgage or trust deed, and a contract for a lien of that kind will be enforced by a court of equity. There is nothing unconscionable in such a provision. Rents and profits are just as much property as the estate out of which they arise, and are equally subject to mortgage and sale.⁹⁰

And such a provision will authorize the court to appoint a receiver, in its discretion, without regard to the solvency or insolvency of the mortgagor and it is a matter of indifference whether the real estate is ample security or not. But there are a number of authorities, which are at variance with this last proposition which will be noticed hereafter.

Undoubtedly a court of equity will exercise a certain discretion in the appointment of a receiver, even when express words are used for the purpose of giving a lien upon the income of the mortgaged property. The court must determine whether the language used in the mortgage is sufficient to give a lien on the income. In the one case the authority arises from the contract, and the express words give a lien on the rents and profits; in the other the court exercises its equitable power under the facts and circumstances presented at the time of the application to appoint a receiver is made.⁹¹

The decided weight of the American authorities, however, is to the effect that a court of equity may, even when the mortgage does not, in express words, give a lien upon the

89—Pringle v. James, 109 Ill. App. 100.

90—Ryan v. Illinois T. & S. Bank, 100 Ill. App. 251; Townsend v. Wilson, 155 Ill. App. 303.

91—Oakford v. Robinson, 48 Ill. App. 270; Wright v. Case, 69 Ill. 535; First Nat. Bank v. Illinois Steel Co., 174 Ill. 140; Ball v. Marske, 202 Ill. 31.

and the first mortgage is satisfied by the proceeds of the foreclosure sale, leaving the second mortgage unpaid, resort may be had for the deficiency of the second mortgage to the rents collected by the receiver. In such a case the second mortgage has the right to be subrogated to the rents and profits.⁹⁵

It is said in many of the decisions of the courts that a junior mortgagee who obtains the appointment of a receiver of the rents and profits in aid of a bill to foreclose his mortgage, is entitled to such rents and profits up to the time of the appointment of a receiver at the instance of a prior mortgage. Undoubtedly where a prior mortgagee is not made a party to the bill to foreclose filed by the second mortgagee such second mortgagee, procuring the appointment of a receiver to collect the rents and profits is entitled to have such rents and profits applied to his mortgage to the exclusion of the prior mortgagee; and in such case the prior mortgagee will not be entitled to payment out of the rents and profits until he has filed a bill to foreclose his mortgage and procures a receivership to be extended to his securities.⁹⁶

In a foreclosure proceeding, by the appointment of a receiver the mortgagee obtains an equitable claim upon the rents due and to accrue, and such claim is superior to any other subsequent to the mortgage, claiming under the mortgagor. And the tenant in possession may be compelled to attorn to the receiver appointed in the case.⁹⁷

Although the grantee of the mortgagor, who has not expressly agreed to pay the mortgage debt, may not be personally liable therefor, but his implied agreement with the mortgagor, by accepting the deed with the proviso that it is subject to the mortgage, is that the lands and the rents and profits mortgaged should stand good for the debt and

95—*Roach v. Glos*, 181 Ill. 440.

97—*Woodyatt v. Connell*, 38 Ill.

96—*Cross v. Will County Nat. Bank*, 177 Ill. 33.

App. 475.

purchaser at the sale has no claim upon them by virtue of his purchase.³

The purchaser at the sale acquires no title to the land during the period allowed for redemption. He merely acquires the right to receive the redemption money, if the premises are redeemed, or a deed for the property if there be no redemption.⁴

§ 2299. Power of a Court of Equity to Conduct Business by a Receiver—Courts of equity have and exercise the power to take possession, by a receiver of property used in a business enterprise and involved in the litigation, and to carry on such business by its receiver, pending the litigation, and to make the expenses of the receivership a lien on such property superior to other liens. Courts of equity have exercised such a power, in a limited extent, in the control and operation of railroads and other property impressed with a public interest. But such a power is to be used sparingly and with great caution. It seems also that the same doctrine has been applied to property of a different character, used in the business of private persons and corporations where it appears necessary to preserve the property for distribution, and in conserving the interest of those who might succeed in establishing their superior right or title.

Ordinarily, when it becomes necessary for a court of equity to take property under its charge, through a receiver, the property becomes charged with the necessary expenses incurred in taking care of and saving it, including an allowance to the receiver for his services. He is the officer and agent of the court, essential to the protection of the things so situated to keep them under its control until the expenses are allowed and paid. When it is determined to continue the business the court has the right, although it should

3—*Stevens v. Hadfield*, 178 Ill. 532. Ill. 105; *Straus v. Tuckhorn*, 200

4—*Standish v. Musgrove*, 223 Ill. Ill. 75.

500; *Schaepfi v. Bartholomae*, 217

exercise with great caution, to make the expenses of such business chargeable upon the corpus of the property, if the income is not sufficient to pay the same. Of course, such expenses must be charged, in the first instance, upon the income, but when that is not sufficient, they may be charged upon the property itself, or the proceeds thereof after a sale.⁵

If the court intends to disapprove and repudiate the acts of its receiver in a proceeding, it cannot retain within its own grasp the fruits and benefits of the acts so repudiated, and disapproved of. If it intends to endorse the acts of its receiver, then the same principles of law must be applied to the interpretation of such conduct as would be applied to an individual under like circumstances, and the same consequences must be held to result as would follow from similar conduct on the part of an individual.⁶

§ 2300. Receiver's Certificate Defined and Explained—In conducting a business under the directions of a court of equity by a receiver, it frequently becomes necessary for the receiver to obtain money to do so. This is usually accomplished by means of receiver's certificates.

A receiver's certificate of indebtedness may be defined to be a document issued by a receiver, upon the order of the court, for money borrowed or received by him on account of the receivership, or on an indebtedness due from the principal defendant, payable to a certain person, for a specific amount, out of the funds controlled by the court, if such fund is sufficient to pay the same in full, or if it is not sufficient then to pay a pro rata share to the legal holder thereof. Whether they are payable in full, depends upon the question, whether the fund under the control of the court is sufficient for that purpose. The payment of such certificates can only be enforced by an application to

5—*Makeel v. Hotchkiss*, 190 Ill. 311; *Knickerbocker v. McKinley Coal Co.*, 172 Ill. 535; *Bartlett v. Cicero L. H. & P. Co.*, 177 Ill. 68.

6—*Smith v. United States Ex. Co.*, 135 Ill. 279.

the court having control of the trust fund for an order upon its acting officer to do so. There is no personal liability upon any one for the payment of such certificates.

It may be that no particular case can be found embodying all of the foregoing qualifications, but they are to be gathered from numerous cases.⁷

§ 2301. Nature and Character of Receiver's Certificates—Where the order of the court under which the certificate is issued, provides that the claims of the creditors of the insolvent may be audited by the receiver, and if found to be just and valid that there shall be issued for such claim a certificate as such receiver as a valid debt against the estate of the insolvent for the amount stated therein, and that lawful holder of each of such certificates is entitled to share in all the payments in the disbursements and assets of the insolvent. Where a certificate is issued under such an order it represents a fully matured liability and entitles the holder thereof to a standing in the receivership case. It is not an unconditional promise of any one to pay a specific sum of money. No suit can be brought thereon for a money recovery. It is not a substantive obligation, but is the mere evidence of an indebtedness proven against the estate under an administrative order for the purpose of administering the estate. This is the sole office and effect of such a certificate, and it is neither negotiable nor quasi negotiable. And when it is further considered that the order of the court required the certificate to be registered by the court officials, and the interest was to be paid only to the registered owner, and that the title of all alleged assignees would not be recognized except on condition of surrender of the old certificate and taking out a new registration, the theory that the title thereto could pass by mere delivery finds little support.

7—Turner v. Peoria & Springfield
R. R. Co., 95 Ill. 134; McCarthy v.
Crawford, 238 Ill. 88.

Such a certificate is not a security of a quasi negotiable character and it cannot be considered upon such a basis in the hands of one who acquires it in good faith, before maturity and for a valuable consideration. The certificate on its face would notify any person that the indebtedness which it evidenced was due to the payee, and it pointed him to the order of the court under and in pursuance of which it was issued; and that the certificate itself was transferable only on the books of the company. This is notice to parties dealing with the certificate that the payee named therein is the owner, and that no other person was the owner. It put every person dealing with the certificate upon inquiry as to the authority of any person other than the payee to deal with the paper. And where a broker attempts to sell or transfer the title to such a certificate, having no title or interest therein, the transaction is fraudulent and void as to the payee, who has not legally parted with his title to it, and does not pass the title of the payee to a purchaser thereof.⁸

A certificate of indebtedness issued by the receiver of a railroad company, not on account of any indebtedness made by the former receiver, or for which the receiver issuing it received no benefit from the payee, is not entitled to be paid out of any funds in the hands of the receiver, either at the suit of the payee or holder for value. Where a court orders a receiver to issue certificates of indebtedness for a specific purpose to be made payable to the person to whom delivered or his order and one is issued payable to bearer, and so becomes negotiated by mere delivery, the holder will take the same subject to all equities against the payee, and a printed copy of the order of the court on the back of the certificate is notice that it is made payable to bearer contrary to the order of court authorizing the issue.

While the courts are zealous to protect the rights of

⁸—*McCarthy v. Crawford*, 141 Ill. App. 276, 238 Ill. 38.

parties who have furnished money for the preservation of trust property, equal care and vigilance will be observed to see that the trust property is not wasted by the improvident acts of the receiver.⁹

Where, however, the money received on receiver's certificates actually goes into the hands of the receiver, and is applied by him for the benefit of the property in his hands, under sanction of the court, equity and justice would require the payment of the certificates.¹⁰

§ 2302. Essentials to the Negotiability of Documents—It will be well here to consider the essentials of a document so as to make it negotiable under the statute, in connection with receiver's certificates.

The requirements to make a document negotiable are clearly set out in the statute:

"An instrument payable in money, to be negotiable, must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.
2. It must contain an unconditional promise or order to pay a sum certain in money.
3. It must be payable on demand or at a fixed or determinable future time.
4. Must be payable to the order of a specified person or to bearer; and
5. Where the instrument is addressed to a drawee he must be named or otherwise indicated therein with reasonable certainty.¹¹

§ 2303. Power of Court to Authorize the Issuing Receiver's Certificate Discretionary—The power of the court to authorize a receiver to issue certificates of indebtedness is to be exercised largely in the discretion of the court, and

9—Turner v. Peoria & S. R. R. Co., 95 Ill. 134.

10—Newbold v. Peoria & S. R. R. Co., 5 Ill. App. 367.

11—Sec. 1, Laws 1907, p. 403; Sec. 19, Ch. 98, R. S.; Hurd's Stat. (1912), p. 1591.

§ 2305. **Corporate Property Liable for Operating Expenses of Receiver**—As a general rule, a corporation, while its property is in the hands of a receiver, has no control over the receiver or his servants, and, therefore, in the absence of any liability imposed by statute, it is not responsible for the negligence or torts of the employes of the receiver; and no suit for damages occasioned thereby can be maintained against the corporation itself. But there are exceptions to this rule.

Where the net income derived from the business during the receivership is diverted from the payment of such operating expenses and applied to the permanent improvement of the corporation, and the receiver is afterwards discharged, and the property is again turned over to the corporation, in such case the corporation is liable for the torts committed during the receivership to the extent of the net income so applied.

Where the property is turned back to the corporation without a sale then the company must be considered as having received the property charged with the satisfaction of any claim which the receiver ought to have paid out of the earnings.¹⁵

A party contracting with a receiver looks to the *rem*, the fund or property *in gremio legis*, backed by the pledge of the court that it shall be liable for all costs and expenses legitimately incurred in pursuance with its orders and decrees. Under such conditions the court should never surrender its custody of the property or discharge the receiver, until all the obligations incurred by him in the proper discharge of his duties have been adjusted and provided for.¹⁶

Where the mortgage creates a charge upon the rents, and provides that a receiver may be appointed, and that he,

15—*Bartlett v. Cicero L. H. & P. Coal Co.*, 172 Ill. 535; *McLean v. Gilispie*, 130 Ill. App. 356.

16—*Knickerbocker v. McKinley*

out of the rents in his hands, should pay the taxes, then he has a right to do so.¹⁷

§ 2306. Liability of Receiver for Taxes—Property held by a receiver is liable to assessment for taxation. While it should be assessed to the receiver, yet the fact that it is assessed in the name of the party for whom the receiver holds possession does not affect the validity of the tax, and it is within the power of the court appointing the receiver to allow the amount of the tax as a claim against the receiver, and order the same paid to the tax collector. Such a claim may properly be regarded as part of the costs and expense of the receivership, and may be ordered paid in full as other costs and expenses.¹⁸

§ 2307. Liability of Receivers on Contracts—Wherever assignees, trustee, receivers or the like, have been held to a personal responsibility, such responsibility is predicated upon contracts made by them either in their official capacity or contracts, which by legal construction are held to have the quality of personal responsibility. Where the receiver makes known to the plaintiff his official relation to the property, and the capacity in which he is acting, he cannot be held personally liable for his contracts in regard to the property.¹⁹

§ 2308. Liability of Receiver for Torts Committed During His Term—A receiver of a railroad company who is exercising the franchise of such company and operating its road, is, in his official capacity, amenable to the same rules of liability as are applicable to the company, when it is operating the road by virtue of the same franchises. For torts committed by his servants while operating the road under his management, he is responsible under the principle of *respondeat superior*. The liability, however, is not a personal responsibility but a liability in his official capacity,

17—Boyd v. Magill, 100 Ill. App. 316.

19—Hebard v. Tilley, 134 Ill. App. 1.

18—Wiswell v. Kunz, 173 Ill. 110.

only; and the damages for such a tort are not to be recovered in suits against him personally, and collected on execution against his individual property, but recovered in suits or proceedings in which he is named or designated as receiver, and to be paid only out of the funds or property which the court appointing him has placed in his possession and under his control. The corporation itself, having no control over either the receiver or his servants, is not, in the absence of an absolute liability imposed upon the company by statute, responsible for the negligence or torts of the employes of the receiver, and no suit against it for damages occasioned thereby can be maintained.²⁰

An action at law may be maintained against one receiver for the torts and negligence of the servants of another receiver, his predecessor in the same receivership. Although a person may have been receiver at one time, and having resigned and another person appointed his successor in office, yet all the while the identity of the *res*,—the matter of the receivership is preserved. Where the torts complained of in the declaration are the negligence of the servants of the receiver in his capacity of the receiver, and another person is appointed to succeed him in such receivership such torts continue to be the negligence of the receiver, and negligence for which the receivership is liable, and by relation, the negligence of the successor in the receivership, since he, and he only, is the legal representative of the receivership.

It is obvious that suits against receivers are really and substantially suits against the funds or property of which they are custodians; and the expression in the judgment that it is "to be paid in due course of administration of the trust" is the key for the solution of the question of whether or not an action at law can be maintained against a receiver for the torts of the servants of his predecessor.²¹

20—McNulty v. Lockridge, 137 Ill. 270; Bartlett v. Cicero L. H. & P. Co., 177 Ill. 68.

21—McNulty v. Lockridge, 137 Ill. 270.

§ 2309. Liability of Receiver for Ground Rent of Leasehold Estate During His Possession—Where on a foreclosure of a mortgage on a long leasehold interest in land, and a receiver is appointed therein, on a sale under such foreclosure which produces enough to pay the decree and costs, the receiver is liable for the rents of the ground during the time he holds possession during the period of redemption.²²

The decision of the trial court in a certain case was, that the receiver could accept the leasehold interest vested in him by the order of his appointment, without becoming bound by the terms of the lease, and could remain in occupancy under the lease for so much of the term as he might choose, and at his pleasure and election abandon the premises and surrender the lease.

On appeal the Supreme Court stated the rule to be, that a receiver does not simply, by virtue of his appointment, become liable upon the covenants of the lease made prior to his appointment by the party for whom he is receiver, but he has the right to elect whether he will accept the lease and make it his own or whether he will refuse to accept it. It might be that it would be of value for the purposes of the trust, or it might be a burden, and if so, it could not be forced upon him. It is for this reason that he has, subject to the order of the court, the right to elect whether he will perform the covenants or not. For the purpose of making this election he is entitled to a reasonable time to ascertain whether the lease would be desirable. The mere acceptance of the trust does not render the receiver liable for the rent of the premises, and he cannot be held until he elects to hold possession as receiver or does some act which is equivalent to such election. If he remains in possession beyond a reasonable time to make the election, he, by implication, elects to accept the lease and becomes bound, as receiver, by its terms, and the remedy of the landlord for

²²—*Bartlett v. Amberg*, 92 Ill. App. 377.

rent may be sought against the estate for which the receiver is appointed. If the receiver elects to adopt the lease he becomes vested with a right to the leasehold estate, and a privity of estate is thereby created between him and the lessor, by which he becomes liable upon the covenants to pay the rent. Neither the courts nor the receiver have any right to disregard contracts or violate obligations. The receiver cannot take, and the court could not authorize him to take, the leasehold estate except as a whole and upon the terms of the lease.²³

§ 2310. Joint Liability of Receivers—Where two or more parties are appointed receivers, each is bound for the acts of the other. One cannot escape liability simply by remaining inactive, or passive, and he cannot shield himself by saying others did the act which he might have prevented.²⁴

§ 2311. Receiver Acting in Good Faith Not Liable for Losses—While it may be true that a receiver has no right to lend the funds which come into his hands as receiver, but in the management of a going business, such as the operating a hotel, the receiver of necessity is required in many cases to exercise his discretion, and if he acts in good faith, and conducts the business as a prudent person would manage his own business, he ought not to be held liable for small losses, occasioned by small loans to guests.²⁵

§ 2312. Right of Receiver to Purchase Property at Foreclosure Sale—The right of a receiver to bid off property at a trustee's sale under a trust deed made to secure the payment of a note of which the receiver was the lawful owner is a right belonging to the receiver to collect the debts of the insolvent. Such an act would be necessary and proper, in the exercise of such power, in order to make the most of the property held as security for the debt, and pre-

23—*DeWolf v. Royal Trust Co.*, 173 Ill. 435; *Link Belt M. Co. v. Hughes*, 62 Ill. App. 318.

24—*Safford v. People*, 85 Ill. 558.
25—*Heffron v. Rice*, 149 Ill. 216.

The party at whose instance the appointment was made should pay all the expenses of the receivership.³⁰

The law is not so powerless that a court of equity may be invoked to sustain an unjust claim, and when it is necessary to take charge of the property by its receiver, on the appointment of a receiver, it can only order that the costs of the receivership can only be paid out of funds in the receiver's hands, and let the person who rendered it necessary to appoint the receiver go free of costs, and have the costs paid out of the property of an innocent party.³¹

Where the complainant dismisses his bill, or the defendant procures its dismissal for want of prosecution, under the statute the defendant is entitled to recover full costs, and the compensation of the receiver, including his solicitor's fees, falls within the meaning of "costs" described in the statute. And such a recovery is a matter of right, and does not rest upon the discretion of the court.³²

§ 2316. Party Procuring Appointment of Receiver Not Liable for Costs—When—Where, however, the appointment of a receiver is legal and proves to have been warranted in equity, and there comes to the receiver sufficient funds or property to pay the ordinary costs and expenses, including the compensation of the receiver, the liability of a complainant, who has acted in good faith, is at an end, and he cannot be held liable for any deficiency created by the operation of the property as a business. The appointment of a receiver is a matter of discretion with the court, especially as to the fitness of the person appointed. By his appointment, the receiver becomes an officer of the court, and subject only to its orders and directions. He is presumably indifferent as between the parties in interest and

30—Myres v. Frankenthal, 55 Ill. App. 390; McAnrow v. Martin, 183 Ill. 467; Knickerbocker v. Benes, 195 Ill. 434; Rice v. McJohn, 244 Ill. 264; Knickerbocker v. McKinley C. & M. Co., 67 Ill. App. 291.

31—Highley v. Deane, 168 Ill. 266; Link Belt M. Co. v. Hughes, 195 Ill. 413.

32—Burrows v. Merrifield, 243 Ill. 362.

business was created by or was the result of gross negligence and mismanagement of the property by the receiver, and the complainant was privy to such acts and misconduct on the part of the receiver, the complainants cannot be held responsible for the same.

While a failure of the receiver to report his acts and doings to the court, as provided by the order of his appointment, might constitute a violation of duty on the part of the receiver it is not to be understood that a failure of the complainant at whose request he was appointed, to enforce the performance of his duties would render him liable for the consequences of such failure.³³

§ 2317. Form of Judgments Against Receivers—The form of a judgment against a receiver should be that the plaintiff “have and recover from the defendant (naming him) receiver of (naming the principal debtor) the sum of (naming the amount) dollars as his damages as aforesaid, to be paid in the due course of administration of the trust, together with his costs and charges herein expended.”

The judgment is in the nature of a judgment *in rem* and against the *res*—the thing against which it has validity and force—is the matter of the receivership. The receiver is sued as such, and merely because he is, for the time being, the tangible representative of the matter of the receivership.³⁴

A personal judgment and execution cannot properly be awarded against a receiver, but it should be against him in his official capacity to be paid in the due course of the administration of the trust.³⁵

It is reversible error to render a judgment against a corporation jointly with the receiver thereof, both joined as defendants in the suit, because the mode of enforcing the

33—McLean v. Gillispie, 130 Ill. App. 356.

34—McNulty v. Lockridge, 137 Ill. 270.

35—Malott v. Howell, 111 Ill. App. 233; Malott v. Mapes, 111 Ill. App. 340.

§ 2319. Interlocutory and Final Orders Considered—Distinction—While the order appealed from may, in a sense, be an interlocutory order, if it effects something more than a mere interlocutory order, it is appealable. So if it could stand and be made available and would result in a deprivation of property, then independent of the act of 1887, an appeal will lie, for the reason that any decree against a party that will deprive him of his property is appealable.⁴⁰

An order which directs money to be paid to a receiver, and which settles the rights of the parties, is a final order, and appealable, nothing further remaining to be done than to comply with the order.

If an appeal were not allowed great injustice might be done innocent parties.⁴¹

§ 2320. Appeal Effected by Filing Bond—No Prayer Necessary—An appeal under this statute is affected and accomplished simply by filing the appeal bond. No prayer for an appeal is necessary, nor an order allowing the same.⁴²

The approval of the appeal bond by the clerk of the trial court, conditioned to secure the costs in the appellate court, perfects the appeal.⁴³

The clerk may approve of the bond.⁴⁴

An appeal, if taken at all, must be taken and perfected within the time limited by the statute.⁴⁵

§ 2321. Effect of Appeal—Where an appeal is perfected from an order appointing a receiver, the jurisdiction and control of the trial court ceases, and the appeal becomes a supersedeas, or a stay to all proceedings to enforce the order; the authorities are that a properly perfected appeal

54; *Nusbaum v. Locke*, 53 Ill. App. 242.

40—*St. Louis, V. & T. H. R. R. Co. v. Vandalia*, 109 Ill. App. 498.

41—*Burnham v. Barrett*, 137 Ill. App. 119.

42—*Alles Plumbing Co. v. Alles*, 67 Ill. App. 252; *Iroquois Furnace Co. v. Kimbark*, 85 Ill. App. 399.

43—*Neil v. Oldach*, 86 Ill. App. 354.

44—*Schoen v. Herzog*, 66 Ill. App. 581; *Harding v. Harding Incandescent Co.*, 98 Ill. App. 141.

45—*Lawyer's Co-operative P. Co. v. Chicago L. B. Co.*, 90 Ill. App. 425; *Kerz v. Galena Water Co.*, 139 Ill. App. 598.

but from a subsequent interlocutory order no appeal is given.⁵¹

An order substituting one person for another as receiver affects only the personnel of an officer of the court, and is purely a matter of judicial discretion, and is an interlocutory order and not reviewable on appeal unless there be special legislation authorizing it; the act of 1887, allowing appeals from orders appointing receivers, does not cover the acts of court making changes from time to time in the persons acting as receivers.⁵²

A decree removing a receiver is not final but interlocutory only, and a writ of error does not lie to review such an order.⁵³

§ 2323. Appeal by Receiver—It is difficult to discover any interest which a receiver has in disobeying the order and direction of the court which appointed him, and obtaining a review of the order appealed from by a court of review. The receiver has no right to set up his own judgment against that of the court, whose order he is bound to obey. The prosecution of an appeal by him is clearly wrong and it will be dismissed by the Appellate Court *sua sponte*.⁵⁴

A receiver cannot appeal from a decree of foreclosure or from any order or decree of the court, except such as relate to the settlements of his accounts. To that extent he has the right to contend against all claims made against him. For this purpose he occupies the position of a party to the suit, though an officer of the court, and after a final decree has the right to appeal to the reviewing court.

Where an appeal is taken to which the receiver is not a party he cannot be bound by its determination. It would be grossly unjust to preclude and bind the receiver by a

51—Schack v. McKay, 97 Ill. App. 460.

52—International P. L. & I. Union v. McGonigle, 72 Ill. App. 399.

53—Vandalia v. St. Louis, V. & T. H. R. R. Co., 209 Ill. 73.

54—Dewar v. Ellwood, 98 Ill. App. 46; Foreman v. Defrees, 120 Ill. App. 486; Stanton v. Andrews, 18 Ill. App. 552.

lished of a usual and customary charge, generally, by receivers for their services as receivers. Chancellors cannot recognize that there is a profession of receivers, fixing their fees as such.⁵⁹

The court in fixing the compensation of the receiver may, in connection with the evidence before it, take into consideration its personal knowledge of the general nature and character and value of the services alleged to have been rendered, and that a court of review will ordinarily defer much to the judgment of the court that made the appointment, and will not disturb its action in fixing the compensation of a receiver, unless the decree is manifestly wrong.⁶⁰

Ordinarily, when the receiver is a co-tenant with the adverse party compensation is not allowed to him; if, however, the appointment is made without the question of compensation being considered then that question is left to the discretion of the court, and it is to be controlled by the circumstances of each particular case.

Where the parties to the suit are equally benefited by the appointment of a receiver, compensation should be allowed him, though he is a party to the suit.⁶¹

It is but fair and just that a party for whom a receiver is appointed should be heard in respect to the allowance of the fees of a receiver, both as to the present and former accounts rendered by him; the administration of a receivership is one and a continuous matter, and at the final hearing at the termination of the receivership he is entitled to be heard upon the aggregate of the allowance and upon the aggregate value of the services of the receiver; and the party is not estopped by orders allowing the receiver certain sums "on account" during the administration of the receivership.⁶²

59—Steele v. Ruprecht, 147 Ill. App. 646.

60—Culver v. Allen M. & S. Assn., 206 Ill. 40.

61—Meissler v. Meissler, 101 Ill. App. 256.

62—Steele v. Ruprecht, 147 Ill. App. 646.

any influence in determining the amount of the compensation of the receiver. The amount of the bond of a receiver is fixed in advance and frequently in anticipation that the money or property which will come into his hands will be more than subsequently does come to his hands or possession. There may, of course, be an allowance for an actual and reasonable expenditure in connection with procuring the surety upon the bond.⁶⁷

§ 2325. Compensation of Receiver as Between Husband and Wife—Where the controversy arises between a husband and wife that provision of the statute (Sec. 8, Ch. 68), which provides that neither husband nor wife shall be entitled to recover any compensation for labor performed or services rendered for the other, whether in the management of property or otherwise, has no application where one of them is appointed a receiver in a suit in which they are both interested, for the reason that the receiver is acting as an officer of the court appointing him and not in his private capacity.⁶⁸

§ 2326. Receiver Entitled to Employ Attorney—A receiver is entitled to the aid of legal counsel if necessary for the benefit of the trust, or to preserve the fund, or to protect the receiver of the estate against unjust and unreasonable attacks—even by the beneficiaries of the trust. His reimbursement for allowance for expenditures for counsel or litigation expenses do not depend wholly upon the result in any such attack, but the reasonableness or unreasonableness of his position must be taken into consideration.⁶⁹

It is a rule of salutary character that a receiver cannot be permitted to employ as his counsel one who is engaged by another party to the proceeding, and whenever the relation of such counsel is hostile to another party to the proceeding wherein the receiver must act, it cannot be tolerated

67—Steele v. Ruprecht, 147 Ill. App. 646.

69—Steele v. Ruprecht, 147 Ill. App. 646.

68—Meissler v. Meissler, 101 Ill. App. 256.

of this cause for all purposes necessary for the proper management of said receivership, until the coming in and confirmation of said receiver's final report and his discharge."

In presenting his accounts for allowance a receiver occupies a position analogous to that of a plaintiff; he is charged with all he admits or is shown to have received, and it is for him to show that he has paid out the sums for which he asks credit. The receiver is held to great strictness in regard to his accounts, and when he fails to produce vouchers for disbursements, a satisfactory reason for such failure should be given.

In the absence of objections by an interested party to the receiver's report, the court should closely scrutinize the accounts of a receiver before approving of them. The inclination to be liberal with other people's property is too well known to be overlooked. Where no voucher for expenditures accompany the report, and no evidence is preserved showing that the court made any investigation of the matter whatever, the trial court should not approve of the report under such circumstances, but should have required more than the uncorroborated statement of the receiver as to the receipts and expenditures—especially the latter—and the necessity of them.⁷²

A receiver should present his accounts before the court in such a shape that the parties in interest may be so informed thereby, that they may assent to their correctness. If they are not assented to the general rule is to refer them to the master.⁷³

§ 2328. Vouchers for Payments Made by Receiver—It is well established that the receiver must take proper receipts from the person to whom he makes payments; in the consideration of his accounts he is subject to the rules to which all accounting parties are subject. The rule as to an accounting by a receiver as stated by Chancellor Kent, is,

72—*Standish v. Musgrove*, 223 Ill. 500.

73—*Hayden v. Chicago T. & T. Co.*, 55 Ill. App. 241.

authority when the final report of the receiver is filed to investigate and determine the correctness of all his accounts, notwithstanding a partial report has been previously approved.⁷⁶

And in case of the approval of the former reports of the receiver, there is no room for the invocation, by the receiver, of the equitable doctrine of estoppel.⁷⁷

§ 2331. Verification of Receiver's Reports—The account of the receiver should be sworn to—verified by his affidavit—and it is not enough that he swears that the account is just and true to the best of his knowledge and belief. He must swear positively to the fact. A number of forms of verification are given in *Heffron v. Rice*, 40 Ill. App. 244, which might be followed.

Looseness in the form of verification of papers required to be verified, ought not to be encouraged. It is a universal principle in all courts that any irregularity in the *jurat* may, unless expressly waived, be objected to at any stage of the case.⁷⁸

§ 2332. Items for Which the Receiver May Take Credit—Ground Rent of a Valuable Leasehold—committed to the charge of a receiver, and which he has paid may be credited to him.

A receiver must pay the ground rent in such case, as a part of the costs of administration, for the period during which he is in possession, occupying and receiving the benefits and enjoying the advantages of the lease.

Until and unless the claim of the purchaser at a master's sale shall ripen into a title, the lessor has no valid or legal claim upon such purchaser for the ground rent.⁷⁹

§ 2333. Expenditures for Repairs, Taxes and Insurance—Under rules once in force the receiver could not be allowed anything for sums expended by him without the order of

76—*Standiah v. Musgrove*, 223 Ill. 500.

77—*Steele v. Ruprecht*, 147 Ill. App. 646.

78—*Heffron v. Rice*, 40 Ill. App. 244.

79—*Bartlett v. Amberg*, 92 Ill. App. 377.

ing the period of redemption, on the settlement of his accounts he is not entitled to credit for taxes paid coming during the period of his receivership, nor for interest coming due on a prior mortgage nor for insurance premium paid by him. The holder of the equity of redemption is entitled as against the purchaser, to the rents and profits during the period of redemption, which remains in the receiver's hands after paying the deficiency decree; it was the duty of the purchaser to pay the taxes, for which he would have credit if the property were redeemed; the interest on the prior mortgage was something with which the receiver had nothing to do; the purchaser took the property subject to that mortgage, and had no right to call upon the receiver to pay any part of it, and the same thing may be said as to the insurance premium. The receiver holds the money received as rents and profits for the holder of the equity of redemption, subject only to the payment of such proper charges against it may be allowed by the court, and not, in any sense, for the benefit of the purchaser at the foreclosure sale.⁸³

The rule is well settled, that a receiver will not be allowed to incur liabilities for repairs against the estate in his hands, or be credited for any outlays therefor, which are not made by leave of the court first applied for and obtained.

The exception to the rule is, that the action may be approved by the court where repairs are made without permission if the sums expended are very small, or if it be shown that he acted in good faith and for the best interest of the property entrusted to him, or that it was necessary to act immediately in order to prevent damage.

Where there is no proof of the justice of the claim and no exigency exists which justifies proceeding with the work without an order of the court, the court is not inclined to relax the rule that has so often been announced with refer-

⁸³—*Stevens v. Hadfield*, 196 Ill. 253.

lowance is made without such reference over objections, it will be error *per se*.

Before a master the receiver necessarily holds the affirmative; it is for him to satisfactorily show that he is entitled to the credit he claims.⁸⁷

Where objections are made to the approval of the accounts of a receiver, the party objecting must point out the objectionable items. Under general words of objection the court will not look through the details of an account to discover errors and mistakes.⁸⁸

§ 2338. Order Approving Receiver's Report Appealable—The order of the court approving the report of the receiver and discharging him from further duty and responsibility is a final order, and appealable; but it is not subject to collateral attack.⁸⁹

§ 2339. Discharge of Receiver—Where property is bid off at a foreclosure sale for the full amount of the decree, interest and costs, the necessity of continuing a receiver therefore appointed, ceases and he should be discharged and the possession restored to the owner of the equity of redemption.⁹⁰

In such a case the right of a receiver to retain possession of the property ceases, and from the date of the sale to the expiration of the time of the equity of redemption, the rents belong to the owner, and he may assert his right to them.⁹¹

But if the mortgagor does not object, and the receiver continues to act, it would be inequitable to permit him to object to the necessary costs of collecting the rents by a receiver whom he has permitted to act as collector of the same. In such case the allowance of the fee of the receiver for such collection is properly allowed.⁹²

87—Heffron v. Rice, 40 Ill. Ap. 244; American T. & S. Bank v. Frankenthal, 55 Ill. Ap. 402.

88—Heise v. Starr, 44 Ill. Ap. 406.
89—Equitable Trust Co. v. Wilson, 200 Ill. 23.

90—Davis v. Dale, 150 Ill. 239.

91—Innes v. Linscheid, 126 Ill. Ap. 27.

92—Carroll v. Haigh, 97 Ill. Ap. 576.

Where a receiver is discharged all the right upon the part of the court to proceed against him is summarily ended, and he is no longer subject to its jurisdiction as such.⁹³

Where a receiver is appointed to collect the rents and profits of the land during the period of redemption, in discharge of the deficiency in the securities, and the land is redeemed by a grantee of the mortgagor, by the payment to the master the amount for which the lands were sold, it is reversible error for the court to discharge the receiver, pending the period of redemption, while the deficiency remains unpaid.⁹⁴

§ 2340. Cost of Receivership—Discretion of Chancellor in Taxing, Reviewable—The discretion of the chancellor in taxing or apportioning the costs is a legal discretion, to be exercised according to equitable principles, otherwise it is a subject of review. And where the reviewing court has no means of determining whether the discretion exercised by the chancellor in this regard concerning the costs of the receivership was proper or not, it can only affirm the decree.⁹⁵

But in a proceeding where the owner of the mortgaged lien is not a party, and a receiver is appointed therein without his asking therefor, and directed to carry on the business, and on a sale under a foreclosure proceeding commenced by the holder of the mortgage lien, independent of the one in which the receiver was appointed, enough was not realized to pay the mortgage debt and costs, the expenses of the receivership cannot be charged against the property itself, to the detriment of the holder of the mortgage lien.⁹⁷

The general rule, however, is that the costs of the appointment of a receiver are entitled to priority in payment

93—Boyd v. Magill, 100 Ill. Ap. 316.

96—Highley v. Deane, 168 Ill. 266.

97—Makeel v. Hotchkiss, 190 Ill.

94—Equitable Trust Co. v. Wilson, 200 Ill. 23; Oakford v. Robinson, 48 Ill. Ap. 273.

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out of the funds realized by the receiver; but in order to raise the propriety of allowing such payment in the court of review, the question must first be presented to the trial court.⁹⁸

A receiver is not entitled to a judgment in his own name, as receiver, in an equity case in which he is appointed and acting as receiver. He is not a party to the case by reason of his appointment as receiver, and is not entitled to a decree or judgment therein, his fees and expenses, and the fees of his solicitor, when allowed by the court, should be taxed as a part of the costs in the case in the regular way.⁹⁹

§ 2341. Termination of Jurisdiction of the Court—The court is without authority to enter orders or decrees binding upon the parties, after its jurisdiction has terminated. And the jurisdiction of the court whose aid had been invoked in a foreclosure proceeding terminates at the expiration of the period allowed by law for redemption.

Where under a decree of foreclosure there is a sale of the premises and no redemption, the title and the rights of the purchaser become vested and fixed as of the date of the expiration of the time for redemption from the sale.¹

§ 2342. Interference with Receiver or Property in His Hands, Contempt of Court—It is generally considered that any interference with a receiver or the property in his hands as such is a contempt of the court which appointed him. He is an officer of the court acting under the direction of the court, and the property in his hands is in the custody of the law, and under the protection of the law. The only right or authority of a third party to interfere with such property is on leave given to do so by the court appointing the receiver.

Where a court, through its receiver, is in the possession

98—*Bogardus v. Moses*, 181 Ill. 554.

1—*Stoddard v. Walker*, 90 Ill. Ap. 422.

99—*McReynolds v. Brown*, 121 Ill. Ap. 261.

join the proceeding, the failure to obtain leave to bring the suit does not oust the other court of the State of jurisdiction.

This rule, however, is subject to an exception in cases where the purpose of the suit is to deprive the receiver of the possession of the property of the receivership. In such case the judgment is void unless leave is obtained to prosecute such suit.

Where, in the furtherance of justice, it becomes necessary for a court of equity to lay hold of the affairs of an insolvent or failing debtor and appoint a receiver to manage, operate and wind up his affairs it would be a strange restriction upon the powers of such a court if it could adjust only such questions arising in the course of the administration of such affairs as are ordinarily cognizable in a court of equity. The jurisdiction of the court having attached in the first instance to protect the equitable rights of the creditors, it will be retained to do complete justice and fully administer upon the property, and in so doing the court of chancery may, if it sees proper to do so, adjust claims against the property arising either out of tort or contract and determine the amount thereof, and makes all proper orders in respect to the time and manner of their payment.³

§ 2343. Reasons for the Rule Against Interfering with the Receiver—The rule requiring a party desiring to proceed against a receiver to obtain the permission of the court appointing him to be first obtained is established to prevent collision of different jurisdictions and not as an unbending pre-requisite to all proceedings against receivers. And where such a rule has been obtained it would seem that, being a matter of discretion, it could not be made the ground for review without some showing of oppression or embarrassment to the various litigants in permitting a bill to be filed against the receiver.⁴

3—Shedd v. Seefeld, 230 Ill. 118.

4—Fox River Paper Co. v. Western Envelope Co., 109 Ill. Ap. 393.

Where a bill is brought against the receiver as such, and the court sustains a demurrer to the bill and allowed the complainant to amend his bill, it was necessarily determined that the complainant should have leave to proceed with his bill. The receiver having been appointed by the same court which grants leave to file the amended bill, that court would not need by either pleading or evidence to be informed of what the record already showed that leave had been granted to file the bill.⁷

§ 2345. Pleading Leave to Sue Receiver—Question of Jurisdiction—The absence of an averment in the pleading that the court appointing the receiver gave the party leave to proceed against the receiver on the property in his hands has led to different conclusions in different courts. Under the decisions of the Supreme Court of Illinois, the absence of the allegation is not under any and all circumstances fatal to the pleading. If the action brought does not contemplate interfering with the possession of the receiver over the property entrusted to his charge, no leave need be obtained, and the absence of leave and the absence of an averment to that effect is a matter which does not go to the jurisdiction of the court: it is a mere matter of contempt and not of jurisdiction, and the receiver waives all questions of that kind by appearance, and after such appearance the court will not entertain a motion to dismiss on the grounds suggested.⁸

But in actions in ejectment and other actions where the purpose of the suit is to obtain possession of the property, it is necessary for the plaintiff to allege in his declaration that such leave has been obtained, or it will be obnoxious to a demurrer.⁹

§ 2346. Want of Leave to Sue Receiver not Jurisdictional—Where a suit is instituted against a party for whom a

7—Fox River Paper Co. v. Western Envelope Co., 109 Ill. Ap. 393.

8—Fox River Paper Co. v. Western Envelope Co., 109 Ill. Ap. 393.

9—St. Louis, A. & S. R. R. Co. v. Hamilton, 158 Ill. 366; Mulcahey v. Strauss, 151 Ill. 70.

jurisdiction of the parties and legal authority to enter the order then a party cannot stand in defiance of it, however improvidently or erroneously made. And where a receiver has been appointed, he becomes the officer of the court, and his possession of the property is the possession of the court itself, and any unauthorized interference therewith, either by taking forcible possession of the property or by legal proceedings for that purpose without the sanction of the court appointing the receiver, is a direct and immediate contempt of court and punishable by attachment. It makes no difference that the party charged with the contempt was not a party to the proceedings in which the receiver was appointed.¹³

§ 2348. Failure of Party to Pay Money on Order of Court Not Contempt Unless Wilful—It would seem from the authorities that it is not competent for a court of equity to imprison a party for contempt on the failure to pay a money decree, unless such disobedience is wilful.¹⁴

But where a receiver has wrongfully expended or converted money in his hands, and is proceeded against in the cause in which he was appointed for contempt, on account of a failure to comply with the order to pay, inability to pay, resulting from a wrongful act, does not present a defense to the proceeding, and the receiver may be imprisoned for contempt, notwithstanding his inability to pay.¹⁵

§ 2349. Liability of Receiver for Contempt of Court—Where a railroad company is enjoined by a state court from doing certain acts, and thereafter a receiver is appointed for the company by a Federal court, the injunction is binding and obligatory upon the receiver, and he becomes liable to punishment for the violation thereof. No question can be, with any protest of legal principle for its support, urged against the binding force of the injunction. According to

13—*People v. Weigley*, 155 Ill. 491.

15—*People v. Zimmer*, 238 Ill. 607.

14—*Dinet v. People*, 73 Ill. 183;

Burnham v. Barrett, 137 Ill. Ap. 119.

every principle of law it is binding upon all persons to whom it is directed. So where the injunction is against the corporation as a legal entity, and its agents and servants, the appointment of a receiver by the Federal court made no change in the corporate body. Its existence was intact, with its legal functions unimpaired, but its functions were to be performed by agents appointed by the Federal court. The agents appointed by the court to perform its duties and exercise its functions, are legally its agents, although they are under the direction of the court appointing them, within the limits of its charter. The court only authorizes the receiver to exercise the privileges and perform the duties prescribed by the charter. The court does not, nor could it if attempted, enlarge or restrict the powers and duties conferred by the charter. When a court appoints a receiver for a corporation it assumes the management of the corporation under and in accordance with its charter, and is bound by its provisions to the same extent that are the directory, and the agents appointed by the court are required to act within the limits of the charter, and to perform all duties imposed thereby.¹⁶

16—*Safford v. People*, 85 Ill. 558.

